Supreme Court, U.S.
FILED
JAN 14 1993
OFFICE OF THE CLERK

No. 92-1202

IN THE

Supreme Court of the United States

October Term 1992

GARY KNOP, *et al.*,

Petitioners,

v.

KENNETH L. McGINNIS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sixth Circuit erred in applying a higher standard than the "deliberate indifference" rule of City of Canton v. Harris, 109 S.Ct. 1197 (1989), to a claim under 42 U.S.C. §1983 for equitable relief against state defendants sued in their official capacity.

Whether the Sixth Circuit erred in vacating an injunction that was based on the district court's finding that supervisory officials had shown deliberate or reckless indifference in failing to respond to a policy or custom of racial harassment of prisoners by staff in the Michigan prison system.

LIST OF PARTIES

Petitioners Gary Knop, John Ford, William Lovett II, Ramando Valeroso, Gus Jansson, Pat Sommerville, Vernard Cohen, T. John Spytma, Robert Shipp, Butch Davis, Ron Mixon, Kerwin Cook, Scott Hicks, Robert Rose, Troy Roberts, and Virecce Gant II are persons who are or were confined at the State Prison of Southern Michigan, the Michigan Reformatory, the Riverside Correctional Facility, or the Marquette Branch Prison, and are representatives of the class of all persons confined at any one of these facilities.

Respondent Kenneth L. McGinnis is Director of the Michigan Department of Corrections. Respondent Dan L. Bolden is Deputy Director of Correctional Facilities Administration. Respondent John Jabe is Regional Prison Administrator for the Central Region. Respondent Pamela Withrow is Warden of the Michigan Reformatory.

Respondent John Hawley is Warden of the Marquette Branch Prison. Respondent James Pogats is Deputy Warden of the Reception and Guidance Center. Respondent John Makowski is Warden of the Riverside Correctional Facility.[1]

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[1] These respondents are the successors in office of Perry Johnson, Robert Brown, Dale Foltz, John Jabe, Theodore Koehler, John Prelesnik, and William Abshirer, respectively, and are automatically substituted for them pursuant to Sup.Ct.R. 35.3.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 977 F.2d 996 and is reprinted in the Appendix to this Petition (hereinafter "App."). The opinions of the United States District Court for the Western District of Michigan, reported at 667 F. Supp. 467 and 685 F. Supp. 636, are also reprinted in the Appendix.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were issued on October 16, 1992. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance,

regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

A. General Background

This case, filed in 1984, sought injunctive relief under 42 U.S.C. §1983 to address a number of conditions and practices at the State Prison of Southern Michigan in Jackson, Michigan; the Michigan Reformatory in Ionia, Michigan; the Riverside Correctional Facility, also located in Ionia; and the Marquette Branch Prison in Marquette, Michigan.

The district court certified a plaintiff class consisting of all prisoners confined at any one of the prisons during the litigation. In 1986 the trial court severed certain issues for immediate trial, and a thirty-five day bench trial took place in 1986 and 1987.[2] The issues were whether defendants engaged in racial discrimination

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[2] Following trial on the severed issues, the plaintiffs ultimately dismissed the remaining claims.

with regard to prisoner job assignments and classification in violation of the Fourteenth Amendment, as well as certain legal access and Eighth Amendment health issues.

The district court subsequently issued an opinion finding several constitutional violations. See Knop v. Johnson, 667 F. Supp. 467 (W.D. Mich. 1987) (App. at 42-135). Of particular relevance here, the district court found that plaintiffs had proved an unconstitutional policy or custom of racial harassment directed at African-American prisoners by staff. App. at 123. In a separate opinion issued the following year, the district court ordered a remedy for the constitutional violations it had found. Knop v. Johnson, 685 F. Supp. 636 (W.D. Mich. 1988) (App. at 136-168).

The defendants appealed to the Sixth Circuit, which approved most of the district court's findings and conclusions.

However, the court of appeals vacated the district court's order of injunctive relief on the issue of racial harassment.[3]

B. The Racial Harassment Claim

The petitioners now seek a writ of certiorari to review the Sixth Circuit's disposition of the racial harassment claim.

After hearing the testimony of numerous witnesses, the district court found that correctional officers frequently harassed African-American prisoners with racial slurs such as "jungle bunny, black bastard, black nigger;" "niggers, black son-of-a-b's, black m.f.'s;" "smart ass nigger;" "you niggers are all alike;" "burrheads, rugheads, or walking brillo head;" "these black niggers from Detroit;" "your nigger mammy;" "half-

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[3] The court of appeals also reversed the district court's finding that denial of access to toilets and sinks violated the Eighth Amendment, as well as the remedy on legal access ordered by the district court, and remanded for further proceedings. App. at 24-25, 30-31, 33.

breed, half white boy, half nigger;" "take your black ass upstairs;" and "I will kill you, nigger." App. at 117. The racially motivated behavior by staff included yelling racial insults over a prison loudspeaker. Id.

The court emphasized that "the testimony quoted in this opinion is only a portion of the credible testimony I heard on the use of racial slurs, and other acts of racial harassment, by correctional staff," and found that use of racial slurs by staff was sufficiently frequent to subject African-American prisoners to "a constitutionally intolerable atmosphere of racial harassment." App. at 121-122. Moreover, the court heard "repeated, credible, testimony about certain correctional officers who use racial slurs on a consistent basis." App. at 123.

The defendants acknowledged that their staff uses racial slurs. App. at 123.

Nonetheless, defendants testified that they rarely, if ever, discipline staff members for engaging in racially discriminatory behavior. Id. The defendants presented no evidence that even officers who use racial slurs on a consistent basis had been the subject of disciplinary action. Id. The district court found that prisoner complaints about racial harassment were not addressed because "defendants almost uniformly demand substantiation, accept the staff officer's denial, and reject the grievance." Id.

Based on this testimony, the district court concluded that racial harassment of African-American prisoners represented a policy or custom of the Department of Corrections, adding that "[p]laintiffs presented an extremely strong case on this issue." App. at 123. Specifically, the district court found that the Department of Corrections "explicitly or implicitly

authorizes, approves, or knowingly acquiesces in the unconstitutional harassment of black inmates by certain staff officers." Id. The district court also found that the named defendants -- supervisory officers of the Department of Corrections who were sued in their official capacities -- "consciously, voluntarily, and with reckless indifference to the rights of black inmates have failed to implement policies that would prevent the situation from occurring, and affirmatively encourage its continuation." App. at 124.

None of these findings were reversed as clearly erroneous by the court of appeals. Nevertheless, the Sixth Circuit concluded that deliberate or reckless indifference of supervisory officials to racial harassment was insufficient to justify injunctive relief under 42 U.S.C. §1983:

> We have recognized that racial harassment by government employees can violate rights protected by the Equal Protection Clause.

> Supervisory officials, however, are not liable for harassment by their subordinates absent a showing that the supervisor encouraged the . . . misconduct or in some other way directly participated in it. The defendants' failure adequately to investigate claims of racial harassment in this case did not, in our view, rise to the level of "encouragement."

App. at 32. (Internal quotation marks and citations omitted). The Sixth Circuit's opinion did not even address, let alone apply, this Court's decision in City of Canton v. Harris, 109 S.Ct. 1197 (1989).

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER THAT CONFLICTS WITH PRINCIPLES ANNOUNCED BY THIS COURT IN CITY OF CANTON v. HARRIS

A. Introduction

In recent years, this Court has frequently considered the meaning of the phrase "policy or custom" under 42 U.S.C.

§1983.[4] While most of this Court's cases have considered this issue in the context of municipal liability for damages, closely related issues also arise in injunctive actions and in actions against state defendants.

This Court's leading case on the standards for finding a municipal "policy or custom" in the absence of a formally promulgated policy is City of Canton v. Harris, 109 S.Ct. 1197 (1989). Under City of Canton, a municipality is liable for violations of the Constitution if city policymakers are "deliberately indifferent"

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[4] See City of Canton v. Harris, 109 S.Ct. 1197, 1203 (1989): "Thus, our first inquiry in any case alleging municipal liability under §1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation. The inquiry is a difficult one; one that has left this Court deeply divided in a series of cases that have followed Monell [v. New York City Dept. of Social Services, 436 U.S. 658 (1978)][.]" The footnote accompanying the text lists a number of cases decided by the Court on this issue.

to the consequences of unconstitutional actions by their subordinates.

In this case, the trial court found that the state defendants were consciously or recklessly indifferent to a policy or custom of racial harassment of African-American prisoners. Without disturbing these factual findings, the court of appeals nonetheless reversed the conclusion that there had been a constitutional violation. This Court should grant certiorari to determine if factual findings sufficient to establish municipal liability under City of Canton are also sufficient to support the issuance of an injunction against state officers.

B. Liability of Municipal and State Defendants Under 42 U.S.C. §1983

Except for the differences between state and local defendants necessarily stemming from the effects of the Eleventh Amendment, this Court has applied the same

principles in both sets of cases under 42 U.S.C. §1983.[5] For example, in Monell v. New York City Dept. of Social Serv., 436 U.S. 658 (1978), the Court's analysis of the scope of municipal liability turned on the general meaning of §1983:

> Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the constitution, local governments, like every other §1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though

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[5] The Eleventh Amendment affords state officers no protection against a federal court injunction requiring them to conform their conduct to the demands of the Constitution. See Ex Parte Young, 209 U.S. 123 (1908). Thus, with regard to injunctive relief under §1983, municipal defendants and state defendants stand on the same footing.

> such a custom has not received formal approval through the body's official decisionmaking channels. . . . Congress included customs and usages [in §1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.

Id. at 690-691 (internal quotation marks, footnote omitted; emphasis added).

Similarly, cases involving state officials as defendants have freely cited cases involving local defendants to elucidate §1983 principles. See, e.g., Kentucky v. Graham, 473 U.S. 159, 166 (1985):

> [I]n an official-capacity action, however, . . . a governmental entity is liable under §1983 only when the entity itself is a "moving force" behind the deprivation, Polk County v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed. 2d 509 (1981) (quoting Monell, supra, 436 U.S. at 694, 98 S.Ct., at 2037); thus, in an official capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. Monell,

> supra, Oklahoma City v. Tuttle, 471 U.S. 808, 817-818, 105 S.Ct. 2427, 2433, 85 L.Ed. 2d 791 (1985), id., at 827-828, 105 S.Ct. at 2437, 2438 (Brennan, J., concurring in judgment).

(footnote omitted). See also Hafer v. Melo, 112 S.Ct. 358, 361-362 (1991).

C. City of Canton and the "Deliberate Indifference" Standard

This Court has elaborated on the holding in Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 694 (1978), that a municipality is liable for injuries inflicted as a result of its "policy or custom." When the specific act causing constitutional harm does not result from a formal municipal policy or a specific decision by an identified policymaker, the municipality is nonetheless liable for its "policy or custom" if policymakers have been "deliberately indifferent" to the consequences of actions by subordinate employees.

As the Court explained in City of Canton:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to be deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

109 S.Ct. at 1205 (footnotes omitted).

An accompanying footnote provided further guidance:

> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

Id. at n.10.

Justice O'Connor's concurring opinion in City of Canton also contained an extended discussion of the governing standard:

> [M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements. The lower courts that have applied the "deliberate indifference" standard we adopt today have required a showing of a pattern of violations from which a kind of "tacit authorization" by city policymakers can be inferred. See, e.g., Fiacco v. City of Rensselaer, 783 F.2d 319, 327 (CA2 1986) (multiple incidents required for finding of deliberate indifference); Patzner v. Burkett, 779 F.2d 1363, 1367 (CA8 1985)("[A] municipality may be liable if it had notice of prior misbehavior by its officers and failed to take remedial steps amounting to deliberate indifference to the offensive acts"); Languirand v. Hayden, 717 F.2d 220, 227-228 (CA5 1983)

> (municipal liability for failure to train requires "evidence at least of a pattern of similar incidents in which citizens were injured or endangered"); Wellington v. Daniels, 717 F.2d 932, 936 (CA4 1983)("[A] failure to supervise gives rise to §1983 liability, however, only in those situations where there is a history of wide-spread abuse. Only then may knowledge be imputed to the supervisory personnel").

Id. at 1209.

D. Under City of Canton, the Sixth Circuit Erred in Reversing the District Court's Finding of a Constitutional Violation

In this case, the trial court found that the racial harassment of African-American prisoners represented a policy or custom of the Department of Corrections. This conclusion was supported by findings that the defendant supervisory officials admitted that officers harassed prisoners with racial slurs, but were consciously and recklessly indifferent to the problem.[6] The

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[6] In §1983 cases, the courts of appeals have treated as equivalent the terms "deliberate indifference," "reckless

(continued...)

court of appeals did not disturb these findings, which fit comfortably within the Court's discussion in City of Canton of findings that would justify liability: a

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[6](...continued)
indifference," "conscious indifference," and "callous indifference." See, e.g., Doe v. Taylor Independent School District, 975 F.2d 137, 142 (5th Cir. 1992)(the Constitution may be violated when public officials act with "deliberate (or conscious) indifference"); Crawford-El v. Britton, 951 F.2d 1314, 1319 (D.C. Cir. 1991) ("deliberate or reckless indifference"); Colburn v. Upper Darby Township, 946 F.2d 1017, 1024 (3d Cir. 1991) (declining to distinguish between "reckless indifference" and "deliberate indifference"); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1145 (3d Cir. 1990)("[t]he deliberate indifference standard requires a showing...that the state actor was recklessly indifferent, grossly negligent, or deliberately or intentionally indifferent"); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796-797 (1st Cir. 1990) ("reckless or callous indifference"). See also Smith v. Wade, 461 U.S. 30, 56 (1983) (punitive damages are appropriate under §1983 when state officers act with "reckless or callous indifference"); Estelle v. Gamble, 429 U.S. 97, 106 n.14 (1976) (characterizing the "callous indifference" standard of Newman v. Alabama, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975), as "not inconsistent with the standard of deliberate indifference").

municipality would be liable under §1983 when its employees so often violated constitutional rights that the need for corrective action must have been obvious to policymakers. City of Canton, 109 S.Ct. at 1205 n.10.

The four cases cited in Justice O'Connor's concurring opinion in Canton as exemplifying the application of the standard for municipal liability also support the district court's finding of a constitutional violation in this case. See 109 S.Ct. at 1209. In Fiacco v. City of Rensselaer, N.Y., 783 F.2d 319 (2d Cir. 1986), the evidence of a policy or custom of non-supervision of police officers consisted of evidence of other claims of police brutality and the city's inadequate procedures for handling such claims. In Patzner v. Burkett, 779 F.2d 1363, 1367 (8th Cir. 1985), the court held that a municipality may be liable if it had notice of prior

misbehavior by its officers and failed to take remedial steps, amounting to deliberate indifference to the offensive acts. See also Languirand v. Hayden, 717 F.2d 220, 227-228 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984) (municipal liability requires a pattern of similar incidents in which persons were injured by misconduct of the city employees, or that serious incompetence or misbehavior was general or widespread); and Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983) (a failure to supervise gives rise to §1983 liability only when there is a history of widespread abuse so that knowledge may be imputed to the supervisory personnel).

In short, the district court found that petitioners met the requirements for proving a constitutional violation under City of Canton's "deliberate indifference"

standard.[7] In reversing the district court, the court of appeals required the petitioners to meet a higher standard. See App. at 32 (petitioners failed to show "encouragement" of racial harassment by supervisory officials).

City of Canton dealt with liability for damages rather than injunctive relief. However, having met the conditions for damages liability under City of Canton, petitioners, a fortiori, also met the standard for injunctive relief.

Indeed, there are substantial reasons for imposing a standard for the issuance of an injunction that is lower than the standard for damages liability. In damages cases involving governments or individual officials, the Court has been concerned that liability not be imposed absent an

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[7] Of course, City of Canton was not yet decided when the district court issued its opinion on August 10, 1987. See App. at 42.

appropriate degree of fault on the part of the defendant. See, e.g., Monell, 436 U.S. at 691-693 (discussing municipal liability in terms of tort concepts); City of Canton, 109 S.Ct. at 1204 (discussing degree of fault appropriate to support municipal liability). This concept of fault as a prerequisite to liability makes policy sense in damages cases.

Fault-based liability makes less sense in injunctive actions. If a state action is violating constitutional rights in a manner that can be cured by an injunction, all that should be legally relevant is that the defendant acts under color of law, not that the defendant is deliberately indifferent to the violation. See 109 S.Ct. at 1205.

For example, assume that a school principal segregated grade school students by race. The school principal would not be a final decisionmaker under Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

Therefore, under Pembaur, the segregation would not automatically constitute a "policy or custom" sufficient to impose liability in damages upon the school district. A school child, however, is still entitled to damages from the principal in his or her personal capacity for the unconstitutional act. Similarly, the school child is entitled to an injunction against this violation of the Fourteenth Amendment, without a showing of deliberate indifference by the school board. The school child's constitutional rights are violated, regardless of whether the school board tacitly or explicitly authorizes the violation of rights, and the plaintiff is entitled to an immediate remedy. Any other rule limiting injunctions under §1983 would, at best, represent something akin to an exhaustion of remedies requirement. Section 1983, of course, includes no such requirement. See Patsy v. Bd. of Regents, 457 U.S. 496 (1982), and McNeese v. Bd. of

Education, 373 U.S. 668 (1963) (school children need not exhaust state administrative remedy to challenge racial segregation).

Moreover, if racial segregation of school rooms within a school district were pervasive enough to amount to a "policy or custom," the school board or other final decisionmaker would be an appropriate defendant to enjoin. This would be so regardless of the degree of fault of the school board. While it is relevant to the imposition of damages whether the school board's conduct with regard to the "policy or custom" was intentional, deliberately indifferent, or merely negligent, it does not follow that the degree of fault on the part of the school board should determine whether an injunction should issue to stop a patently unconstitutional "policy or custom."

II. THE COURTS OF APPEALS HAVE ADOPTED APPROACHES TO THIS ISSUE THAT ARE SHARPLY AT ODDS WITH THAT OF THE SIXTH CIRCUIT

With the exception of the decision below, the courts of appeals that have considered the standards for relief against state officials have applied a standard consistent with that developed in City of Canton.

In Sample v. Diecks, 885 F.2d 1099 (3d Cir. 1989), the court of appeals considered whether a former prisoner could sue for being detained beyond the expiration of his sentence. The court held that the possible liability of the Commissioner of Corrections had to be determined under the standards articulated in City of Canton, including whether there was a custom or practice and whether the Commissioner knew of the risk and was nevertheless indifferent to it. Because City of Canton was decided after the proceedings in the trial court, the court of

appeals remanded for application of City of Canton.

In Wilks v. Young, 897 F.2d 896 (7th Cir. 1990), the plaintiff was a former prisoner seeking damages for the alleged failure of prison officials to prevent an assault. The court of appeals reversed a jury verdict in favor of the prison officials and remanded for further proceedings. The court of appeals, citing City of Canton, ruled that the district court had erred in failing to give a requested instruction on the possible liability of supervisory officials.

In Greason v. Kemp, 891 F.2d 829, 838 (11th Cir. 1990), the court of appeals cited City of Canton in the course of holding that jury questions existed as to whether a supervisory prison official could be liable for deliberate indifference based on his failure to institute corrective procedures.

In Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561-562 (1st Cir. 1989), the court of appeals applied a deliberate indifference standard to affirm a jury award against an official of the Department of Police for the Commonwealth of Puerto Rico based on the official's failure to supervise his subordinates.

See also Holt v. Caspari, 923 F.2d 103, 106 (8th Cir. 1991), rev'd on rehearing on other grounds, 961 F.2d 1370 (8th Cir. 1992) (prison supervisor would be liable for failure to take action, amounting to deliberate indifference or a tacit authorization of a process violating constitutional rights), and Ting v. U.S., 927 F.2d 1504, 1512 (9th Cir. 1991) (applying City of Canton standard for supervisor liability to Bivens[8] claims).

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[8] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

All of these decisions are inconsistent with the approach of the court of appeals below. Had the Sixth Circuit applied City of Canton in this case instead of the higher "encouragement" standard, it would have affirmed the district court on the issue of racial harassment. These differing approaches by the lower courts demonstrate that clarification of the law on this point is needed.

CONCLUSION

For all the reasons set forth herein, petitioners urge that the Court grant certiorari.

Respectfully submitted,

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Dated: January 1993

92-1202

No.

Supreme Court, U.S.
FILED
JAN 14 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1992

GARY KNOP, *et al.*,

Petitioners,

v.

KENNETH L. McGINNIS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 88-1563/1634/1879

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 88-1563/1634

GARY KNOP, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

PERRY M. JOHNSON, et al.,
Defendants-Appellants,
Cross-Appellees.

ON APPEAL and cross-appeal from the United States District Court for the Western District of Michigan

No. 88-1879

EVERETT HADIX, et al.,
Plaintiffs-Appellees,

v.

PERRY M. JOHNSON, Individually and as Director of the Michigan Department of Corrections,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed October 16, 1992

Before: NELSON and BOGGS, Circuit Judges; and WILHOIT, District Judge.*

DAVID A. NELSON, Circuit Judge. These are consolidated appeals in two class actions brought against the Director of the Michigan Department of Corrections by inmates of the Michigan prison system who challenge the constitutionality of certain conditions of their confinement. Both cases involve the State Prison of Southern Michigan at Jackson, and *Knop* involves three other Michigan prisons as well.

An issue common to the appeals in both *Knop* and *Hadix* is whether the district courts erred in finding, as both did, that Michigan prisoners have been denied their right of access to the courts. On the records before us, and finding no clear error in the facts as determined by the district courts (Enslen and Feikens, JJ.) in their thorough and well-crafted opinions, we are satisfied that there are at least some Michigan prisoners who have been denied the type of access to the courts required under current Supreme Court doctrine.

Although it is well established that the federal constitution requires states affirmatively to assist state prisoners in obtaining access to the courts for presentation of constitutional claims related to their confinement, see *Bounds v. Smith*, 430 U.S. 817 (1977), there has been some uncertainty as to the breadth of the class of claims covered by this requirement and as to how far the states must go in affirmatively facilitating the prisoners' access

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*The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

to the courts. Our recent decision in *John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992), which involved incarcerated juveniles, teaches that affirmative assistance need not be provided for litigation that is not related to the inmate's incarceration. The same limiting principle applies, we believe, with respect to adult prisoners. The principle was correctly applied in *Knop*, but not in *Hadix*; the remedial order in the latter case should have been limited, as was the order in *Knop*, to assistance for prisoners in making collateral attacks on their convictions and in challenging the constitutionality of the conditions of their confinement.

Meaningful access to the courts cannot be assured for juveniles, as both sides agreed in *John L.*, absent access to an attorney. For adult prisoners, however, access to the courts need not entail access to an attorney; access to an adequate law library, or to paralegal personnel with access to such a library, is sufficient. The *Hadix* court directed the Department of Corrections to provide both a constitutionally sufficient law library and a staff of attorneys; in this, as in certain other respects, we conclude that the court abused its discretion.

The *Knop* court did not require that a staff of attorneys be maintained, but it ordered the Department to procure paralegal services by contract with a non-profit corporation. The court rejected a plan under which paralegal assistance would have been provided directly by the Department. Here too, we believe, the remedy went too far; both cases must be remanded for the development of less intrusive remedies. In the interest of insuring uniformity in the reshaping of the remedies, we shall remand both cases to a single court.

The appeal in the *Hadix* case is limited to the access to courts issue, but *Knop* presents several other issues as well. Except as indicated below, we shall affirm the judgment of the district court as to each of the remaining issues presented in *Knop*.

I

The plaintiff class that was certified in *Knop* consists of prisoners at the State Prison of Southern Michigan at Jackson,[1] the Marquette Branch Prison, the Michigan Reformatory at Ionia, and the Riverside Correctional Facility, also located in Ionia. *Knop v. Johnson*, 667 F. Supp. 467, 469 (W.D. Mich. 1987). With the exception of the prisoners at Riverside and the Central Complex at Jackson, the *Knop* class evidently corresponds to that certified in *Walker v. Johnson*, 544 F. Supp. 345 (E.D. Mich. 1982), *aff'd in part and rev'd in part sub nom. Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985).

One of the claims advanced in *Walker* was that the Michigan authorities had "violated plaintiffs' equal protection clause right to meaningful access to the courts as established in the Supreme Court case of *Bounds v. Smith*." 544 F. Supp. at 361. The district court acknowledged in *Walker* that Michigan's prison law library facilities were adequate, but found that a cutback in library hours following a series of prison riots had unlawfully restricted access to the libraries. *Id.* The district court ordered that library hours be increased.

On appeal, this court observed that there had been no showing that any prisoner had actually been denied access to the courts or had actually been prejudiced in a lawsuit. 771 F.2d at 932. We reversed the order in which the district court had specified hours of operation for prison libraries, and we directed the court to consider, on remand, "whether adequate access to court has been denied any prisoner." *Id.*

Although the *Walker* case was remanded to the Eastern District of Michigan, access to courts was one of the

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[1]The Jackson facility contains several "complexes," one of which -- the Central Complex, housing about 2,400 prisoners -- is the subject of the order in *Hadix*. Central Complex prisoners have been excluded from the *Knop* class as far as the access to courts issue is concerned.

issues litigated in a 35-day bench trial conducted by Judge Enslen, of the Western District of Michigan, in *Knop*. The parties did not inform Judge Enslen that the access to courts issue had been remanded to another court, and it was only in preparing his opinion that he focused on this. See 667 F. Supp. at 484-85.[2] Acknowledging that "[i]t may be regrettable that there have been two federal court proceedings involving the same issue and the same class of inmates," Judge Enslen concluded that it was simply too late in the game for him not to decide the plaintiffs' access to courts claim. *Id.* at 485. We have no quarrel with this conclusion.

Judge Enslen discussed the merits of the plaintiffs' access claim at pages 486 through 496. After describing the library system in detail and identifying its perceived defects, Judge Enslen found that although some inmates were able to use the system to prepare effective complaints, a greater number (particularly inmates confined in segregation, the illiterate, and inmates with intellectual handicaps) were unable to use the system to gain meaningful access to judicial forums. Such access, as the court correctly noted, entails not only the drafting of complaints and petitions for relief but also the drafting of responses to motions to dismiss and the drafting of objections to magistrates' reports and recommendations.

After the submission of proposed remedial plans and comments thereon, Judge Enslen conducted further hearings in March of 1988. He subsequently issued a

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[2]In an opinion filed 18 months earlier in connection with a motion for partial dismissal on *res judicata* grounds, however, the *Knop* court did say that it had examined *Walker* carefully, and it did note that the Sixth Circuit had remanded the case "for the district court to consider whether adequate access to court has been denied any prisoner." Slip Op. of 3/20/86, docket item 466, at p. 7, quoting *Walker*, 771 F.2d at 932. Given the extraordinary amount of written material connected with this litigation, and given the fact that none of the litigants questioned the appropriateness of the Western District as a forum for litigation over the access to courts issue, we do not find it surprising that the district court should have failed to raise this question at the outset on its own motion.

final opinion and order, reported as *Knop v. Johnson*, 685 F. Supp. 636 (W.D. Mich. 1988), directing the Michigan Department of Corrections to contract with a non-profit corporation for providing paralegal assistance to prisoners; requiring the hiring of an attorney to function as a program director; and establishing staffing requirements that included specified numbers of civilians with two-year paralegal degrees, prisoner paralegals, and/or inmate law clerks. The order further provided that the corporation's board of directors, only a minority of whom were to be chosen by the Department, should develop standards for providing general research assistance to any prisoner using a law library, plus drafting assistance to illiterate prisoners and those unable to express themselves in English. Portions of the order were stayed by this court pending appeal.

Shortly after entry of the remedial order in *Knop*, an opinion and order were filed in *Hadix*. See *Hadix v. Johnson*, 694 F. Supp. 259 (E.D. Mich. 1988) (Feikens, J.). A class consisting of all prisoners confined in Jackson's Central Complex had been certified in *Hadix* some years earlier. Most of the issues raised in the case were settled under a comprehensive consent decree entered early in 1985. Section VI of the consent decree, captioned "Access To Courts," contained detailed provisions on how much time various categories of prisoners should be permitted to spend in prison libraries, what books should be included in the libraries, how prisoners facing court deadlines could get additional library time, and related matters. (A copy of Section VI, with its "Appendix B," is set forth as an appendix to this opinion.) Two questions relating to court access were not settled in the consent decree, however, and the decree provided for the submission of these questions to the court for resolution after a hearing on the merits. The decree framed the questions thus:

> "(1) Whether and to what extent Defendants are constitutionally required to provide attorneys to assist prisoners with legal matters.

(2) If attorneys must be provided, whether and to what extent these attorneys must be independent."

The opinion and order issued by Judge Feikens in 1988 broadened the issue as follows:

"whether, and to what extent, the defendants are constitutionally required to provide access to the courts for inmates in the Central Complex through the provision of additional attorneys, paralegals (civilian or inmate), and other means to assist inmates with civil actions (including habeas corpus proceedings) and related matters (i.e., grievances)." 694 F. Supp. at 262-63.

In 1979 Judge Feikens had remarked on "the existence of experienced writ writers at [Jackson] and other institutions who are able to frame an inmate's complaint in constitutional terms well enough for presentation to a state or federal court." *Glover v. Johnson*, 478 F. Supp. 1075, 1097 (E.D. Mich. 1979). By 1988, however Judge Feikens had become persuaded, as had Judge Enslen, that the pool of competent inmate writ-writers, or "jailhouse lawyers," was not adequate to meet constitutional norms.[3]

Judge Feikens concluded that the Department of Corrections was constitutionally required to establish a program of legal assistance for Central Complex inmates substantially more comprehensive than the program ordered in *Knop* for inmates housed elsewhere. Under the *Hadix* order, for example, requests for legal assistance were to be entertained not only in connection with the drafting of habeas corpus petitions and civil rights claims (including, but not limited to, those challenging conditions of confinement) but also in connection with "[o]ther civil claims involving matters such as domestic relations,

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[3]The Department of Corrections has also had its problems with jailhouse lawyers. In the proceedings held before Judge Enslen with respect to a remedy, the Department proposed abolition of the jailhouse lawyer system altogether. See 685 F. Supp. at 641.

personal injury, deportation, workers' compensation, social security, detainer, wills and estates, and taxation." 694 F. Supp. at 295. The *Hadix* court further found that representation should be provided "in civil matters where an inmate (1) is a defendant; (2) did not initiate the action; and (3) where an inmate's rights will expire absent timely initiation of suit . . . ." *Id.* at 294. To provide non-judicial relief for prisoners with administrative concerns, moreover, the *Hadix* court ordered the Department of Corrections to adopt an elaborate grievance program conforming to criteria spelled out by the court. *Id.* at 296-98. And to provide the legal representation thought to be necessary for Central Complex prisoners, the Department of Corrections was ordered to enter into a five-year renewable contract with Prison Legal Services of Michigan, Inc. That entity, under the court's order, was to maintain staffing levels consisting, at a minimum, of a program director, four staff attorneys, six certified paralegals, and necessary auxiliary staff. *Id.* at 295.

The Director of the Department of Corrections has appealed from the orders in both *Hadix* and *Knop*. The *Knop* plaintiffs have appealed from the denial of certain racial discrimination claims.

II

In Part A of this section we discuss the constitutional underpinnings and scope of the right to affirmative assistance in obtaining access to courts. In Part B we discuss the types of legal matters to which the state's duty of providing affirmative assistance extends.

A

Bounds v. Smith, 430 U.S. 817 (1977), represents the Supreme Court's most far reaching description of the "right of access" first recognized in *Ex parte Hull*, 312

U.S. 546 (1941).[4] The Court's opinion in *Bounds* is silent as to the source of this right, but on other occasions the Supreme Court has said variously that it is founded in the Due Process Clause of the Fourteenth Amendment, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), or the Equal Protection Clause, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7, and see *id.* at 11 n.6 (1989) (plurality opinion of Rehnquist, C.J.), or the First Amendment right to petition for a redress of grievances, *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (same). Lower courts have also implicated the Privileges and Immunities Clause of Article IV. *Nordgren v. Milliken*, 762 F.2d 851, 853 (10th Cir.), *cert. denied*, 474 U.S. 1032 (1985); *Smith v. Maschner*, 899 F.2d 940, 947

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[4] In *Hull*, a prisoner -- who was incarcerated at Jackson, as it happens -- had repeatedly tried to send a petition for habeas corpus, supported by exhibits, to the Clerk of the United States Supreme Court. Michigan prison officials kept confiscating these materials, but with help from his father the prisoner finally succeeded in getting them to the Court. To justify the institution's attempts to prevent the prisoner from filing his papers, the prison warden cited a regulation requiring all petitions to be reviewed and approved by state officials before they could be filed. The Supreme Court held the regulation invalid:

> "The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. at 549.

The prohibition against abridging or impairing a prisoner's right to apply for habeas corpus relief subsequently spawned a requirement for affirmatively aiding and abetting such applications. The seminal case is *Younger v. Gilmore*, 404 U.S. 15 (1971), a two-sentence per curiam opinion affirming the decision of a three-judge district court in *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970) (California Department of Corrections ordered either to expand its prison libraries or "devis[e] another system whereby indigent prisoners are given adequate means of obtaining the legal expertise necessary to obtain judicial consideration of alleged grievances cognizable by the courts." *Id.* at 112). The only authority that the Supreme Court cited on the merits in *Younger v. Gilmore* was *Johnson v. Avery*, 393 U.S. 483 (1969), which held simply that in the absence of alternative legal resources a state may not constitutionally prohibit prison inmates from

(10th Cir. 1990). See generally *John L. v. Adams*, 969 F.2d 228, 231-32 (6th Cir. 1992).

One Court of Appeals has suggested, with respect to principles developed under the "right of access" rubric, that "because their textual footing in the Constitution is not clear, these principles suffer for lack of internal definition and prove far easier to state than to apply." *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985). Judge Enslen, similarly, has spoken of the "vagueness" of the decision in *Bounds*. *Knop*, 667 F. Supp. at 493. But while the constitutional underpinnings of today's right of access doctrine may be thought to lack intellectual coherence, we believe that the parameters of the doctrine are relatively clear.

The Supreme Court did not hold, in *Bounds*, that prison authorities are constitutionally required to provide attorneys-at-law to assist prisoners in the preparation of habeas corpus petitions and the like. The *Bounds* inmates asserted, before the district court, that a library facility plan proposed by North Carolina prison officials as a means of assuring access to the courts could not pass constitutional muster unless supplemented by a legal defenders' program under which prisoners could receive the assistance of independent attorneys. See *Smith v. Bounds*, 538 F.2d 541, 542 (4th Cir. 1975). The district court *refused* to require the state to establish an independent attorneys' office, and this decision was affirmed by the Court of Appeals for the Fourth Circuit: "the District Court correctly ruled that the State is under no constitutional duty to offer the inmates of its penal institutions both adequate legal research facilities and an independent attorneys' office, however helpful the dual service might be." *Id.* at 544 (footnote omitted). The Supreme Court likewise affirmed, holding that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the

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assisting other inmates in the preparation of petitions for post-conviction relief.

preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law." 430 U.S. at 828 (footnote omitted, emphasis supplied). As the Eleventh Circuit has observed, "it is noteworthy that *Bounds* refers to law libraries *or* other forms of legal assistance, in the disjunctive, no fewer than five times." *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986).[5]

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[5]Our own court, like other courts of appeals, has always understood the Supreme Court to have meant what it said in holding that prisoners must be provided adequate law libraries "or" adequate assistance from persons with legal training. In *Holt v. Pitts*, 702 F.2d 639, 640 (6th Cir. 1983), we explicitly endorsed "the proposition that a prisoner's constitutionally-guaranteed right of access to the courts has been protected when a state provides that prisoner with *either* the legal tools necessary to defend himself, *e.g.*, a state-provided law library, *or* the assistance of legally-trained personnel." (Emphasis supplied.) We went on to observe, in *Pitts*, that

> "The alternative avenues open to state authorities to protect a prisoner's right of access to the courts are precisely that -- alternatives. The choice between alternatives lies with the state." *Id.*

Cf. Penland v. Warren County Jail, 759 F.2d 524, 531 n.7 (6th Cir. 1985) (*en banc)* ("Prisoners may not dictate to the state the method by which access to the courts will be assured"). Accord, *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984) ("*Bounds* requires only 'adequate law libraries *or* adequate assistance from persons trained in the law,' not both"); *Ward v. Kort*, 762 F.2d 856, 860 (10th Cir. 1985) ("Under *Bounds*, the State is free to make a choice . . . ."); *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986) (reversing a district court holding that "no plan contemplating libraries alone could be sufficient due to inmate illiteracy;" the *Bounds* Court necessarily contemplated reliance on inmate writ-writers or nonlawyer law clerks, see *Johnson v. Avery*, 393 U.S. 483 (1969)); *Kelsey v. Minnesota*, 622 F.2d 956, 958 (8th Cir. 1980) ("government need not provide inmates with *every* possible means of access to the courts").

Where female prisoners lack their male counterparts' history of "self-help" in the law, however, equal protection considerations may require that library facilities be supplemented by assistance from a lawyer. *Canterino v. Wilson*, 546 F. Supp. 174, 216 (W.D. Ky. 1982), *aff'd*. No. 86-6067, 1989 U.S. App. LEXIS 4789 (6th Cir. April 10, 1989) (unpublished), *cert. denied*, 493 U.S. 991 (1989). *Cf. Smith v. Bounds*, 538 F.2d 541, 545 (4th Cir. 1975) (women prisoners may not be afforded less access to legal research facilities than male prisoners). See also *Glover v. Johnson*, 478 F. Supp.

Although the *Bounds* Court noted that many states provide some degree of professional or quasi-professional legal assistance to prisoners under programs that "may have a number of advantages over libraries alone," 430 U.S. at 830-31, the Court specifically stated that "a legal access program need not include any particular element" of this kind. *Id.* at 832. Inmates must be assured access to courts that is "adequate, effective, and meaningful," *id.* at 822, but the touchstone is access to *courts*, not access to lawyers.

As the Supreme Court held in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), prisoners have no constitutional right to be represented by state-paid counsel when mounting collateral attacks upon their convictions. Even where inmates on death row are concerned (and there are no such inmates in Michigan, that state having no death penalty), *Bounds* teaches that "[t]he requirement of meaningful access can be satisfied in various ways," and "state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (concurring opinion of Kennedy, J., quoting *Bounds*, 430 U.S. at 833).

The prison library plan that was approved in *Bounds* contemplated the establishment of approximately seven core libraries to serve a prison population of about 10,000 people. 538 F.2d at 542-43. It was stipulated that "each library [would] make use of one or two inmates as typists to prepare court petitions and . . . supervise the day-to-day use of the library. * * * Those inmates who work in the libraries . . . [would] be trained to the best extent possible in researching legal questions and assisting inmates in their research. They [would] also be permitted to help illiterate and semi-literate inmates." *Id.* at 543,

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1075, 1094-97, 1103 (E.D. Mich. 1979) (the fact that a women's prison library was much smaller than the men's library at Jackson did not constitute illegal discrimination, but the state was ordered to continue offering the assistance of Prison Legal Services because the women had no experienced inmate writ-writers and lacked any history of self-help in the legal field).

n.1. If North Carolina had implemented this plan, the *Bounds* litigation would presumably have been at an end.

North Carolina did not properly implement the plan, as it turned out. Almost a decade after the plan was approved as satisfying the state's constitutional obligation, the state still had no workable program for training inmate paralegals to assist other prisoners in the use of the libraries. See *Harrington v. Holshouser*, 741 F.2d 66, 69 (4th Cir. 1984). Notwithstanding the inadequacy of the state's efforts in this area -- described by the Court of Appeals as "a chronology of failure," *id.* -- the court initially rejected the thesis that "the only way that the State constitutionally can afford library access to its inmates is by employing the services of a legal services plan . . . ." *Id.* at 70.

On remand, after the state had repeatedly failed to respond to orders directing it to show that it was in compliance with its plan, the district court finally concluded that the only way to ensure that inmates received meaningful access to the courts would be to require the assistance of licensed counsel. *Smith v. Bounds*, 610 F. Supp. 597, 605-06 (E.D.N.C. 1985). The plan adopted by the district court provided for ten attorneys (one for every 1,000 prisoners), who were to be made available under a contract with Legal Services of North Carolina, Inc. *Smith v. Bounds*, 657 F. Supp. 1327 (E.D.N.C. 1986).

A Fourth Circuit panel affirmed the district court's decision. It was uncontested, the panel said, that, among other things, "the state had not demonstrated [even after the passage of ten years] that it had provided for the training and placement of *any* inmate paralegals." *Smith v. Bounds*, 813 F.2d 1299, 1302 (4th Cir. 1987) (emphasis supplied). The panel went on to make the following observations:

> "The district court did not conclude, as the defendants contend, that prisoners have a

> constitutional right to access to an attorney. The district court ordered a remedy of attorney assistance because the state's program of law libraries had failed to meet the defendants' constitutional obligation of providing meaningful access to the courts." *Id.*

The panel opinion was approved by the court en banc in a brief per curiam opinion that stressed the defendants' long history of failing to respond to the district court's orders and concluded that the record showed "North Carolina was unable or unwilling to implement its library plan consistent with minimum constitutional requirements." *Smith v. Bounds*, 841 F.2d 77, 78 (4th Cir.) *(en banc)*, *cert. denied*, 488 U.S. 869 (1988).

The Director of the Michigan Department of Corrections has not engaged in the sort of contumacious conduct attributed to the North Carolina authorities in the *Bounds* litigation. Absent such conduct, we see no justification for the federal courts to require the authorities in Michigan to use taxpayer dollars to hire attorneys-at-law for the preparation of prisoner lawsuits.[6]

It may well be a good idea for Michigan to provide lawyers for prisoners who want to bring lawsuits of their own. Federal judges, however, should be ever mindful of the obvious fact that not all good ideas are mandated by the Constitution. *Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986). As Justice O'Connor succinctly put it in her concurring opinion in *Murray v. Giarratano*, 492 U.S. 1, 13 (1989), "[b]eyond the requirements of *Bounds*, the

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[6]In many cases, it should be remembered, the taxpayers will already have paid for attorneys to represent the prisoners in their criminal trials and in their direct appeals. Approximately 20 attorneys on the staff of the State Appellate Defenders Office, for example, represent indigent Michigan prisoners in appeals as of right. *Hadix*, 694 F. Supp. at 275. That kind of legal aid is, of course, a horse of a different color; we are concerned here with civil actions in which the prisoner is the plaintiff, not criminal actions in which the prisoner is the defendant.

matter is one of *legislative* choice based on difficult policy considerations and the allocation of scarce legal resources." (Emphasis supplied.)[7]

In our constitutional democracy, as we understand it, *legislative* choices are to be made by legislators who are subject to removal by the people, and not by judges who enjoy office for life. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (courts lack both authority and competence to assume a legislative role); *cf. Kelley v. Metropolitan Co. Bd. of Educ.*, 836 F.2d 986, 996 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988). A "'mother knows best' approach should play no part in traditional constitutional adjudication." *Murray v. Giarratano*, 492 U.S. 1, 11 (1989) (plurality opinion of Rehnquist, C.J.).[8]

But the conclusion that Michigan need not provide attorneys to prepare prisoner lawsuits does not end our inquiry. Standing alone, law libraries that are adequate for prisoners who know how to use them and who have reasonable physical access to their collections are not adequate for prisoners who cannot read and write English, or who lack the intelligence necessary to prepare coherent pleadings, or who, because of protracted confinement in administrative or punitive segregation or protective custody, may not be able to identify the books they need.

Under the library plan that was considered by the Supreme Court in *Bounds*, as we have seen, the libraries would not have stood alone; it was contemplated that trained inmates would be made available for helping the illiterate and semi-literate, for performing or helping in

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[7] "Prison administration is, moreover, a task that has been committed to the responsibility of [the legislative and executive branches of government], and separation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley*, 482 U.S. 78, 85 (1987).

[8] For a somewhat different view, see Feikens, "Federal Courts are Governing Society Today: Should They?" 1991 Det. L. Rev. 1363.

the performance of legal research, and for typing court petitions. It does not appear that comparable assistance has been provided, to the extent required, in the Michigan prisons. Judge Enslen found, for example, that librarians at Jackson's North and South Complexes were not competent to perform legal research; that inmates hired there as law clerks were not allowed to assist other inmates in their legal research; and that "the often-fabled jailhouse lawyers or writ-writers are, at least in the Michigan system, too few and often too uninformed to provide adequate assistance to the inmates." *Knop*, 667 F. Supp. at 488. As far as Jackson's Central Complex is concerned, similarly, Judge Feikens found that neither the librarians nor the inmate library clerks were sources of legal assistance; that the assistance available from jailhouse lawyers and inmate paralegals was "unreliable" and "restricted by financial, security, and other constraints;" and that outside attorneys were not available with any certainty, particularly for the substantial percentage of inmates (between 20% and 50%) who are unable to explain their grievances in writing. *Hadix*, 694 F. Supp. at 284-85.[9] The records contain evidence of a number of specific instances where unassisted inmates suffered individualized harm because of inability to use library resources properly.

We do not disagree with the conclusion, reached by both of the district courts, that something more was required in the way of paralegal assistance. It is fundamental that a prisoner who claims to be confined unconstitutionally must be allowed to state his case to a court. Some such prisoners, given law books and

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[9]Inmates who are reasonably articulate, on the other hand, and who have legitimate constitutional claims cognizable under 42 U.S.C. § 1983, are often able to retain outside counsel. The bar is not unaware that 42 U.S.C. § 1988 authorizes the award of reasonable attorney fees to plaintiffs who prevail in § 1983 actions, and such awards are sometimes substantial. See, for example, *Roland v. Johnson*, No. 91-1460, 1992 U.S. App. LEXIS 22047 (6th Cir., September 4, 1992) (unpublished), where the lawyers for a Michigan prisoner who prevailed in a § 1983 action are receiving a fee of almost $150,000.

simplified pleading forms of the sort furnished by the courts, can handle the task adequately themselves. Others, for reasons fully explained in the opinions of both district courts, cannot. For prisoners of the latter sort, as a practical matter, there can be no meaningful access to the judicial system unless some literate person is available to reduce their stories to intelligible written pleadings.

To the extent that inmate writ-writers, or jailhouse lawyers, are not adequately filling the needs of prisoners who claim they are being held unconstitutionally, the state must furnish, at a minimum, the functional equivalent of jailhouse lawyers who are up to the job. This means paralegals -- not necessarily individuals who have completed two-year training courses designed for document-managers at large corporate law firms, but intelligent laypeople who can write coherent English and who have had some modicum of exposure to legal research and to the rudiments of prisoner-rights law. "Although legal training need not be extensive, *Bounds* does require that inmates be provided the legal assistance of persons with at least some training in the law." *Gluth v. Kangas*, 951 F.2d 1504, 1511 (9th Cir. 1991) (citations omitted).

The order of the district court in *Hadix* contemplates that Prison Legal Services will "represent" inmates in a variety of civil matters. The court's verb choice is significant, and it reflects, we think, a misunderstanding of what the Supreme Court has said the Constitution requires. Inmates who have signified a desire to go to court to present civil rights claims or claims for post-conviction relief are not *ipso facto* entitled to legal *representation*. They are entitled, rather, to "access" -- which means getting the courthouse door opened in such a way that it will not automatically be slammed shut on them. Once access has been attained, whether through a complaint that is entirely homemade or through one prepared by or with the help of a writ-writer or paralegal, the court can decide whether the case presented is one that

calls for the appointment of a lawyer to represent the plaintiff.

Under 28 U.S.C. § 1915(d), the court may request an attorney to represent any indigent prisoner litigant -- but "[a]ppointment of counsel pursuant to 28 U.S.C. § 1915(d) is not appropriate when a *pro se* litigant's claims are frivolous . . . or when the chances of success are extremely slim." *Childs v. Pellegrin*, 822 F.2d 1382, 1384 (6th Cir. 1987), quoting *Mars v. Hanberry*, 752 F.2d 254, 256 (6th Cir. 1985). If the court does not choose to see that the litigant receives legal representation, the state obviously has no independent duty to provide such representation. And the state, as Judge Enslen correctly noted, "is not obligated to do anything more than assist inmates at the pleading stage." *Knop*, 667 F. Supp. at 494. The required assistance, as we have seen, falls considerably short of legal "representation."

Although the *Knop* court acknowledged that "a district court must impose the least intrusive remedy available," 685 F. Supp. at 637 (internal quotes omitted), and must allow the defendants to choose their preferred method of providing at least minimally adequate access to the courts, *id.* at 641, we believe that the final order in *Knop* was more intrusive than necessary. The defendants submitted a plan for providing assistance for certain prisoners through paralegals employed and supervised by the state. The court rejected this approach because (1) it failed to assure that prisoner-paralegal communications would receive the kind of confidentiality that attaches to lawyer-client communications, (2) it required prisoners to waive any right to sue the paralegals for malpractice, and (3) it created an unacceptable degree of conflict of interest, the paralegals not being independent of the state. *Id.* In place of the state's plan, the court ordered the Department of Corrections to obtain paralegal services from a non-profit corporation controlled by a board of directors on which both the prisoners and the department would have representation. *Id.* at 647. The program of legal services

furnished by the corporation was to be operated under detailed bylaws developed by the board and approved by the court. *Id.* Other than appointing a minority of the corporation's board of directors and paying all the bills, the state was evidently to have little to do in seeing to the provision of paralegal assistance.

It is far from self-evident that access to courts cannot be assured without having paralegals hired by a legal services corporation that has been created to insulate the paralegals from supervision, direct or indirect, by those whom the electorate have chosen to govern. We note that under the laws of the Commonwealth of Virginia, for example, "unit attorneys" are appointed directly by the state government to serve as legal advisors, or "talking lawbooks," for inmates wishing to bring incarceration-related litigation. See *Murray v. Giarratano*, 492 U.S. 1, 5 (1989); *cf. Giarratano v. Murray*, 668 F. Supp. 511, 514 (E.D. Va. 1986). Even as to prisoners on death row, five of the current justices of the United States Supreme Court concluded, in *Giarratano*, that Virginia's scheme does not violate the Constitution. And the dissenting opinion of Justice Stevens, joined by the remaining three justices (two of whom are no longer members of the Court), did not assert that the Virginia plan would be constitutionally inadequate for prisoners who have not been sentenced to death.

Johnson v. Avery, 393 U.S. 483 (1969), is also instructive in this connection. Because Tennessee provided no meaningful alternative for prisoners who wished to seek post-conviction relief, the United States Supreme Court held that Tennessee could not impose a blanket prohibition against inmates setting themselves up as writ-writers for other inmates. "Jails and penitentiaries," said the Court, "include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Id.* at 487. Such persons are not automatically entitled to appointed counsel when they indicate they wish to seek post-

conviction relief, the Court declared, which is why the state must at least let them consult with prisoner writ-writers -- and must do so notwithstanding that such writ-writers "are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them." *Id.* at 488.

The *Johnson* Court noted with apparent approval that "[a]t least one State employs senior law students to interview and advise inmates," while other states have public defenders, paid from public funds, available to consult with prisoners on habeas corpus matters. *Id.* at 489. Without expressing any judgment concerning such plans, the Court noted that they demonstrate the availability of "techniques . . . to provide alternatives if the State elects to prohibit mutual assistance among inmates." *Id.* at 489-90.

Neither a system involving the direct employment of legal personnel by a state nor a system of mutual assistance among inmates could guarantee avoidance of the type of potential conflict of interest by which the *Knop* court was troubled. Neither system, similarly, could assure a prisoner whom the system had failed that he would have a reasonable chance of obtaining a collectable judgment for malpractice. And where unregulated inmate writ-writers are concerned, at least, it seems doubtful that the confidentiality of inmate communications could be assured. Such considerations simply did not seem to trouble the *Johnson* court -- one reason, in all probability, being that the Court obviously did not think of writ-writers as providing legal representation.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), finally, the Supreme Court declared that illiterate inmates involved in prison disciplinary proceedings "should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the *staff* or from a sufficiently competent inmate designated by the *staff*." *Id.* at 570 (emphasis supplied). Here again, the Supreme Court seems to have

been far less concerned than was the *Knop* court about reliance on assistance provided by employees of the state.

Perhaps the advantages of placing all prisoner paralegals on the payroll of a non-profit corporation would outweigh the disadvantages of doing so. We do not believe, however, that the courts may appropriately tell the Department of Corrections how to strike this balance. "Injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). Fundamental precepts of comity and federalism admit of no other rule -- and such precepts "are perhaps nowhere more compelling than in actions seeking relief against unconstitutional practices . . . in state penal institutions." *Kendrick v. Bland*, 740 F.2d 432, 437 (6th Cir. 1984), citing, among other cases, *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981); and *Bell v. Wolfish*, 441 U.S. 520, 548 (1979). See also *Turner v. Safley*, 482 U.S. 78, 88-89 (1987); *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); and *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 753 (1992). If the State of Michigan wishes to facilitate its prisoners' access to the courts by furnishing assistance through paralegals hired and supervised by the state itself, we think it should be permitted to do so.

B

We turn next to the question of the types of legal matters to which the state's obligation of affirmative assistance extends. The *Knop* order requires only that the prisoners be furnished paralegal assistance for making collateral attacks upon their convictions and for challenging the conditions of their confinement; the *Hadix* order, as we have seen, requires legal assistance for a variety of additional purposes, including the handling of a broad spectrum of civil matters in which inmates have been named as defendants, as well as matters in which an

inmate must commence suit in a timely manner or suffer his claim to be barred by laches or a statute of limitations.

Other courts of appeals have declined to extend the *Bounds* rule beyond assistance in initiating habeas corpus proceedings (the type of lawsuit addressed in *Johnson v. Avery*, 393 U.S. 483) and civil rights actions involving constitutional claims (a form of action which the Supreme Court has held cannot reasonably be distinguished from the habeas action. *Wolff v. McDonnell*, 418 U.S. 539, 577-80 (1974)). See, *e.g.*, *Nordgren v. Milliken*, 762 F.2d 851, 855 (10th Cir.), *cert. denied*, 474 U.S. 1032 (1985); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) (*semble*). Our own court, similarly, has read *Bounds* as requiring affirmative assistance for incarcerated juveniles only in "the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration." *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992). As to other types of civil actions, although "states may not erect barriers that impede the right of access of incarcerated persons," we held that a requirement of affirmative assistance would be "an unwarranted extension of the right of access." *Id.* at 235-36. If such a requirement is unwarranted for incarcerated juveniles, it is unwarranted for incarcerated adults.

It might be a good idea for the taxpayers of Michigan to provide legal assistance for prisoners in all civil matters as to which a need can be demonstrated, just as it might be a good idea for the taxpayers to provide such assistance for the populace at large. Again, however, we return to the obvious truth that not every good idea is mandated by the Constitution. And if the ordinary law-abiding Michigander has no constitutional right of access to the public purse for legal assistance on claims involving such things as domestic relations, personal injury, deportation, workers compensation, social security, detainer, wills and estates, and taxation, it does not seem to us that such a constitutional right springs into existence by virtue of the

needy person's having been convicted of a crime and sentenced to prison.

III

In the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997 *et seq.*, Congress provided for the granting of continuances in prisoner civil rights actions "in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a)(1). In this connection, Congress directed the United States Attorney General to "promulgate minimum standards for the development and implementation of a plain, speedy and effective system for the resolution of [state prisoners'] grievances . . . ." 42 U.S.C. § 1997e(b)(1). Such grievance resolution systems as may be "voluntarily submitted" by individual states are to be reviewed by the Attorney General and may be certified by him as being in compliance with the minimum standards. 42 U.S.C. § 1997e(c)(1). The failure of a state to adopt an administrative grievance procedure meeting the prescribed standards cannot constitute the basis of an action by the Attorney General, however, notwithstanding the Attorney General's power, under § 1997a, to sue states that are believed to be depriving prisoners of their civil rights. 42 U.S.C. § 1997e(d).

Although adoption of a prisoner grievance system designed to meet federal standards is not mandatory under the act passed by Congress, it has been made mandatory for the Central Complex at Jackson under the order issued by the court in *Hadix*. Agreeing with the findings of "two court-appointed experts . . . that the current grievance program is ineffective and unresponsive to the needs of both the inmates and the Central Complex administration," 694 F. Supp. at 296, the district court ordered the Department of Corrections to draft policy directives to meet standards promulgated by the Attorney General for grievance programs. *Id.* at 297. The court went on to specify in some detail how this would be done with respect to such matters as inmate review of the

grievance program, representation of the entire Central Complex inmate population in the review process, and employee participation in an advisory role. *Id.* The court further ordered that the grievance process should incorporate a series of discrete steps specified by the court; that the Department of Corrections should "implement personnel changes as recommended by Professor Wolfson [one of the court-appointed experts] in his study," including the hiring of qualified persons to serve as grievance investigators, members of grievance panels, grievance coordinators, and "other personnel as necessary for the objectives;" that certain of the newly hired persons ("grievance coordinators independent of the Department of Corrections, [hired] to oversee the work of the grievance investigators and the grievance panels") should provide yearly reports evaluating the performance of the grievance system; that persons involved in the grievance process should be provided training in investigation and mediation techniques; and that "the Department of Corrections shall commission a periodic review of the grievance system at the Central Complex by an outside body." *Id.* at 297-98. The district court felt that a restructured grievance program would reduce the workload of the courts by encouraging administrative resolution of disputes that currently wind up in court. The modifications that the Department of Corrections was directed to make in the existing grievance system were said to be "minimal but necessary." *Id.* at 298.

Desirable though many of these provisions may be, they do not strike us as "minimal." Neither do they appear to come within the ambit of the issues reserved by the consent decree for resolution by the court. And be that as it may, they certainly do not represent the least intrusive remedy that can be justified as necessary to vindicate inmates' constitutional right of access to the courts. If prisoners currently exercise their right of access to the courts on a broader scale than the courts would like, that hardly justifies judicial intervention in the state's administrative system under the guise of protecting the right of access to, of all things, the courts! "Federal

courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 762 (1992). This part of the *Hadix* order looks to us like judicial legislation run wild.

IV

Subsequent to issuance of the order in *Hadix*, the defendant moved for a new trial on the strength of what appeared to be *ex parte* communications between the court and a key witness for the plaintiffs. The motion was denied in an order (docket item 505) wherein the court set forth the pertinent facts in considerable detail. The defendant contends on appeal that the *Hadix* court committed reversible error in failing either to recuse itself or to grant a new trial.

The communications in question followed a request that Judge Feikens made in open court during testimony presented by Sandra Girard, the Director of Prison Legal Services, Inc. The court asked Ms. Girard if she would prepare a written memorandum describing the impact on Prison Legal Services of frequent prisoner transfers necessitated by overcrowding. Ms. Girard said she would, agreeing, at the court's request, to send copies to counsel. No objection was made by the defendant.

In response to the court's request, Prison Legal Services prepared a nine-page memorandum dated March 11, 1988. Copies were sent to the court and to counsel.

A few days later Judge Feikens sent Sandra Girard a letter asking further questions. Although defense counsel initially disclaimed receipt of a copy of this letter, which is not part of the official court record, it is now conceded that copies were sent to counsel. Ms. Girard responded to the court's request by furnishing a survey and related materials describing legal services programs in other

states. It is undisputed that defense counsel were provided copies.

Following his review of the new materials, Judge Feikens had his law clerk telephone Ms. Girard to ask about the availability of further background materials. Pursuant to this inquiry, Ms. Girard sent the court a letter, with a copy to counsel, offering to provide, among other things, certain questionnaires dealing with legal services programs in other states. Judge Feikens then had his law clerk telephone Ms. Girard again and request copies of the materials referred to in her letter. A third package of documents was submitted to the court in response to this request, with copies of the transmittal letter going to counsel. This led to the filing of written objections by the defendant and, ultimately, to the motion for new trial.

This court has made it clear that it is "impermissible for a trial judge to deliberately set about gathering facts outside the record." *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980). Moreover, "a judge may not direct his law clerk to do that which is prohibited to the judge." *Id.* *Ex parte* communications from a judge's chambers to one side in a contested lawsuit are "clearly at odds with our adversary system of justice." *Price Bros. Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 425 (6th Cir. 1981) (Merritt, J., concurring). In view of these principles, Judge Feikens' requests for additional information should have been placed on the record, and the one-on-one telephone calls from the court's law clerk to the plaintiffs' key witness should not have been made.

In context, however, these lapses appear relatively harmless. Because Ms. Girard was consistently scrupulous about sending counsel copies of her letters -- as the court doubtless expected her to be -- the court was furnished nothing that counsel did not know about. Judge Feikens has expressly stated, moreover, that "[n]one of the documents included in the three packages of materials

submitted by Girard in response to inquiries made by the Court formed any basis for my findings of fact or my conclusions of law in my Memorandum Opinion and Order filed July 1, 1988." Doc. entry 505. We have no reason to question this, and we find no error in the denial of the defendant's motion.

The only remaining issue raised on appeal in *Hadix* is whether the *Hadix* court erred in taking judicial notice of proofs in *Knop* without notice to the defendant. Our disposition of the appeals makes it unnecessary to address this question.

V

The access to courts claim that was tried in *Knop* contained a sub-issue not presented in *Hadix*: the constitutionality of the prison officials' system of handling mail sent to inmates by courts and by counsel. Concluding that there were problems in this area, the court ordered implementation of a system-wide policy insuring that legal mail will be opened only in the presence of the addressee if that is the addressee's wish.

The *Knop* court also heard evidence on three additional claims: (1) that prisoners had been subjected to cruel and unusual punishment by reason of the Department's alleged failure to provide proper winter clothing; (2) that the lack of toilets and washbasins in certain locked cells constituted cruel and unusual punishment; and (3) that inmates were denied equal protection of the law by a variety of practices claimed to reflect racial discrimination.

The district court granted a measure of relief on each of these claims. Taking judicial notice of the severity of Michigan's winters, the court ordered that inmates who were required to go outside in the wintertime be provided adequate clothing, including hats and gloves or mittens and, where appropriate, boots. The installation of in-cell flush-toilets was ordered in certain units at the Riverside

facility. And with regard to racial discrimination, the Department of Corrections was ordered to forward all prisoner grievances on the subject to the Legislative Ombudsman's Office. Both sides have appealed from the district court's order on the racial discrimination question, and the defendants have appealed on the other issues.

A

Under Michigan's established policy, privileged mail is to be opened only in the presence of the addressee prisoner if the prisoner has opted to request such treatment. During their orientation to the prison system, inmates receive a handbook that is supposed to explain the privileged mail policy, along with a variety of other matters. The policy is explained orally as well.

In practice, the policy varies from institution to institution. The handbooks used at some facilities do not explain the policy clearly or do not discuss it at all. At Jackson and Marquette, mail from any attorney is treated as privileged after an inmate notifies the mailroom that he has an attorney. At the Reformatory, only mail from attorneys specified by the inmate receives such treatment.

The district court found no constitutional infirmity in the opt-in system as such, but did find that the authorities' method of implementing the system, particularly at the Reformatory, permitted needless infringement of the inmates' right to confidentiality in their communications with counsel. The court observed that it is not uncommon for a prisoner to receive mail from a court-appointed attorney before the inmate knows the attorney's identity. The court therefore ordered implementation of a uniform policy at all facilities, with inmates being asked at intake whether they wish to invoke their privilege of being present at the opening of legal mail. Where the response is affirmative, all incoming mail from attorneys and from the courts is to be treated as privileged mail.

A prisoner's right to receive mail is protected by the First Amendment. See *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Parrish v. Johnson*, 800 F.2d 600, 603 (6th Cir. 1986). In criminal settings, the Sixth Amendment protects the attorney-client relationship from unwarranted intrusion. *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974). Prison officials may, of course, impose restrictions that are "reasonably related" to the prison's security needs or other "legitimate penological objectives." *Turner v. Safley*, 482 U.S. 78, 87 (1987). Our court has said that prison officials must "put forth legitimate reasons for interfering with a prisoner's incoming mail." *Parrish*, 800 F.2d at 604.

We agree with the conclusion of the district court that prisoners may not be required to designate particular attorneys in order to activate privileged treatment of their legal mail. The district court acted properly in requiring that each prisoner receive written notice of the legal mail policy upon intake and in eliminating any requirement that requests for special treatment of legal mail be renewed upon transfer from one facility to another.

B

The district court found that the defendants were failing to provide inmates with adequate winter clothing. This finding was not clearly erroneous. We cannot agree with the defendants' argument that the district court wrongly substituted its judgment for that of prison authorities. The Eighth Amendment prohibits punishment that "involve[s] the unnecessary and wanton infliction of pain." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)). Exposure to Michigan winters without adequate clothing can obviously inflict pain. No legitimate government interest is served by withholding adequate clothing, and the district court was justified in ordering the remedy it did.

C

Certain cells at Riverside lack flush-toilets and wash basins with running water. Inmates in these cells use central lavatory facilities as permitted by prison officers. There are occasions when access to the central toilets is not permitted, necessitating the use of nonflushable receptacles in the inmates' cells. The court found the Riverside facilities to be generally clean, with the exception of areas where urine may have been spilled on the floor.

Access to toilets varies among four population groups at Riverside. One hundred thirty cells in the Riverside reception and guidance center lack toilets and wash basins. Inmates in the center are locked in their cells approximately 18 hours per day, being out of the cell three times a day for meals and once for recreation. Inmates receive portable urinals on their arrival, and some inmates use these to throw urine and feces into the courtyard. The court found that the defendants failed to provide inmates in the reception area with regular access to bathroom facilities, forcing them to relieve themselves in their cells. The court concluded that this was a violation of the Eighth Amendment.

Ninety-six cells in the protective custody unit lack toilets and basins. Protective custody inmates are locked in their cells each night from about 10 or 11 p.m. to 6 or 6:30 a.m. During the day they are generally out of their cells. Officers frequently let inmates out during the night to use the toilet facilities. Nonetheless, the court found that inmates faced a substantial risk of not being allowed to use the toilet facilities upon request and were frequently forced to urinate or defecate in their cells. In the court's view this was unconstitutional.

Approximately 20 inmates are housed in the administrative segregation unit. These inmates are confined to their cells except for a daily recreation period of one hour and during toilet trips. Officers make regular

bathroom runs four or five times a day and make rounds every 30 minutes, at which time inmates can request to use the toilet. These requests are not always granted, however, particularly during the late night and early morning. The court found this to be unconstitutional.

We do not agree that it violates the Eighth Amendment to require prisoners to use nonflushable toilets on occasion. The drafters of the Eighth Amendment used them, after all, and countless millions of modern Americans have done so too. The district court "specifically f[ound] that the [Riverside Correctional Facility] and the [Riverside Psychiatric Center] generally are clean facilities, that defendants maintain clean hallways, and, with the exception of areas where urine may be spilled on the floor, that the cells are clean." 667 F. Supp. at 480 (citations omitted). The "[d]efendants established . . . that correctional officers frequently let inmates out during the night to use the toilet facilities." *Id.* at 481. In light of these findings, we do not believe a constitutional violation can be shown on the basis of additional findings that inmates "do use their urinals in their cells, and on occasion even are forced to defecate in their cells," or that inmates regularly throw urine and feces into the courtyard. *Id.*

D

The district court found that black inmates are not intentionally discriminated against on a classwide basis in terms of their placement in protective custody; that there is no intentional racial discrimination with respect to eating areas, food serving lines, or servers; and that racial disparities in job assignments do not represent a widespread or general pattern of discrimination. The court found further that although prison officials do not condone incidents of racially discriminatory punishment of inmates, they have condoned racial slurs. This form of racial harassment was found to represent a policy, practice, or custom of the Department of Corrections, and

the court ordered the defendants to submit a remedial plan.

Because the plan ultimately submitted was considered inadequate, the court took the (in its words) "somewhat drastic step of mandating particular disciplinary actions." *Knop*, 685 F. Supp. 636, 640. The order prescribed a detailed grievance system to be operated under the supervision of the Legislative Ombudsman's Office. Pursuant to the procedure described in *First National Bank of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976), the court subsequently indicated that it was prepared to modify this portion of the order to reflect the fact that the court had no jurisdiction over the Ombudsman's Office. Instead of telling the Ombudsman's Office what to do, the court proposed to order the defendants to contract with that office, or with a similar independent agency, to implement the grievance and disciplinary procedure outlined in the court's order.

We have recognized that racial harassment by government employees can violate rights protected by the Equal Protection Clause. *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). Supervisory officials, however, are not liable for harassment by their subordinates absent "a showing that the supervisor encouraged the . . . misconduct or in some other way directly participated in it." *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.), *cert. denied*, 469 U.S. 845 (1984). The defendants' failure adequately to investigate claims of racial harassment in this case did not, in our view, rise to the level of "encouragement." The detailed grievance procedure set forth in the district court's order, moreover, intrudes unnecessarily in the state's operation of its prisons. Part III of the order, set forth at 685 F. Supp. 644-46, will therefore be vacated.

Shortly before trial, the plaintiffs altered their discrimination-in-employment claim to assert that the defendants' anti-discrimination policy was unconstitutional because it set a limit on minority employment. The

district court correctly recognized that the altered claim pitted members of the class against each other, and it decertified the class with respect to the claim. The plaintiffs do not challenge the partial decertification, but they contend that the court erred in failing to decide the individual claims of the named plaintiffs. As the defendants point out, however, the court was not asked to do so.

VI

The district court imposed sanctions against the defendants and their counsel under Rule 11, Fed. R. Civ. P., for the filing of four pretrial motions for summary judgment. The court determined that the motions were legally untenable and had been filed for an improper purpose. Finding that the district court did not "base[ ] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence," and thus did not abuse its discretion, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), we uphold the imposition of the sanctions.

The judgments of the district courts are **AFFIRMED** in part and **REVERSED** in part. The remedial order entered by the district court in *Hadix* is **VACATED**, Parts I, III and IV A of the remedial order entered by the district court in *Knop* are **VACATED**, and both cases are **REMANDED** to the United States District Court for the Western District of Michigan for further proceedings not inconsistent with this opinion.

APPENDIX
SECTION VI OF CONSENT DECREE

VI. Access to Courts

1. Each General Population inmate may use the law library at least six hours per week in two-hour segments. To accommodate this use, the law library shall remain open at least 55 hours per week, with at least one-third of those hours during evenings after 5:00 p.m. and weekends. The law library will remain open additional hours as staff becomes available. Prisoners who have pending court cases requiring additional law library time in excess of the six-hour guarantee will be allowed the additional access necessary.

2. Within 30 days after the entry of the Judgment in this matter, the Department will initiate procedures to order for the main law library, to the extent not currently provided, each of the publications listed in Appendix B, "Minimum Collection for Main Law Libraries," with the addition of a complete edition of Michigan Compiled Laws Annotated. For each required publication, the Department shall have a subscription for revised additions, pocket parts, or advance sheets which shall be made available for prisoner use forthwith upon delivery to the institution. Periodically, at six-month intervals, Defendant shall survey each collection to identify missing or mutilated volumes. All missing or mutilated volumes, however discovered to be missing or mutilatd, will be replaced or restored promptly.

3. Inmates in Administrative Segregation or Protective Custody shall be guaranteed two hours per week direct personal access to a limited law library collection as indicated in

Appendix B, "Minimum Collection for Administrative Segregation Law Libraries." In addition, on three days each week, such inmates may request five volumes brought to them from the main law library collection unless the particular volumes are loaned to another inmate. These volumes shall be delivered to the inmate in segregation on the day following the day on which requests are collected. The book(s) may be collected after 24 hours.

4. Law library facilities shall be maintained with adequate ventilation and lighting with sufficient space to accommodate the reasonable needs of the inmates.

5. The allotted time per prisoner for law library use shall not include the time necessary to travel to and from the library, but will include only the amount of time actually spent in the library.

6. The detail system by which inmates in general population presently gain access to the law library shall be continued in order to assure prisoner access to the law library.

7. Special and additional library time shall be allowed on a call out system to an individual prisoner as needed, provided that he can demonstrate a bona fide need as determined by the supervisor of the law library. Such a bona fide need shall include, but not be limited to, situations such as a deadline for filing briefs, pleadings, responses to a pleading, or other such documents with a court.

8. Inmate staff working in the law library shall not have the authority to deny other prisoners access to the law library. Inmate staff shall be

supervised by a professional librarian and staff clerk.

9. The Department of Corrections shall provide notarial services as necessary. Pursuant to the request of plaintiffs, the Department of Corrections shall post a notice at the prison law library indicating that in many cases declarations under penalty of perjury, in lieu of formal affidavits, are allowed.

10. The Department shall enforce its policy for treatment of privileged legal mail, including mail from Federal, State and local courts, governmental agencies, and attorneys, which provides that such mail will not be read, that upon the inmate's written demand, such mail will not be opened except in the presence of the inmate to whom the mail is addressed, and that such mail may be opened to search for contraband. The Department further shall provide that inmates shall seal all outgoing legal mail which prison officials shall then cause to be posted unopened in the U.S. mail.

11. Paralegal training will be instituted at the State Prison of Southern Michigan as a regular educational program under the auspices of Jackson Community College.

12. Electric typewriters shall be permitted.

13. Any property limitation imposed on prisoners shall not apply to legal papers and law books except that if the quantity thereof conflicts with important institutional goals such as security or fire safety, a limitation may be sought through the administrative hearing process. The standard for imposition of a limitation shall be whether the material in

question is reasonably necessary to assist the prisoner with respect to his pending litigation.

14. Each visiting attorney shall be afforded a table and chair in a space providing suitable privacy.

APPENDIX B

MINIMUM COLLECTION FOR MAIN LAW LIBRARIES

MICHIGAN MATERIALS

1. Michigan Compiled Laws Annotated (Vol. 1-2, 38-39, 40-41)

   OR

   Michigan Statutes Annotated (Vol. 1, 24, 24A, 25, 25A)

2. Michigan Digest (West) (all)

   OR

   Michigan Digest (Callaghan) (all)

3. Michigan Supreme Court Reports (Vol. 358 (1960) to the present plus subscription to advance sheets)

4. Michigan Appeals Reports (Vol. 1 to the present plus subscription to advance sheets)

5. Shepard's Michigan Citations (all)

6. Gillespie - Michigan Criminal Law and Procedure (all)

7. Honigman and Hawkins - Michigan Court Rules Annotated (all)

8. Michigan Criminal Jury Instructions (all)

9. Hensel - Appeals in the Michigan Courts

FEDERAL MATERIALS

1. United States Code Annotated (Constitution volumes, Titles 18, 28, 42)

2. Supreme Court Reporter (From Vol. 80 (1959) to the present plus subscription to advance sheets)

   OR

   United States Supreme Court Reports, Lawyers' Edition, 2nd Series (From Vol. 4 (1959) to the present plus subscription to advance sheets)

3. Federal Reporter, 2nd Series (From Vol. 300 (1962) to the present plus subscription to advance sheets)

4. Federal Supplement (From Vol. 200 (1961) to the present plus subscription to advance sheets)

5. Federal Practice Digest, 2d (all)

6. Shepard's United States Citations (all)

7. Shepard's Federal Citations (all)

8. Wright - Federal Practice and Procedures (Vols. 1, 2 and 3) (Criminal)

9. Sokol - Federal Habeas Corpus (latest edition)

GENERAL MATERIALS

1. Corpus Juris Secundum (22, 22A, 23, 23A, 24, 24A, 24B (Vols. covering Criminal Law))

2. Black - Black's Law Dictionary, Revised 4th Ed. (1968)

   OR

   Ballentine - Ballentine's Law Dictionary, 3rd Ed. (1969)

3. Cohen, M. - Legal Research in a Nutshell (latest edition)

   OR

   Elias - Legal Research: How to Find and Understand the Law

4. Bailey and Rothblatt - Complete Manual of Criminal Forms, 2nd Ed. (2 volumes)

5. Israel and LaFave - Criminal Procedure in a Nutshell, 2nd Ed. (1975)

6. Criminal Law Reporter

7. Rubin - Law of Criminal Correction, 2nd Ed. (1973)

8. Werner - Manual for Prison Law Libraries (1976)

9. Dorsen, N. - The Rights of Prisoners (1973)

   OR

   Rudovsky, D. - The Rights of Prisoners (1973)

   OR

   Palmer, J.W. - Constitutional Rights of Prisoners (1977)

10. LaFave, W.R. - Principles of Criminal Law (1978)

OR

LaFave and Scott, Handbook in Criminal Law (1972)

OR

Loewy, A.R. - Criminal Law in a Nutshell, 2nd Ed. (1972)

Additional Volumes

A complete edition of MCLA for SPSM Main Law Library.

MINIMUM COLLECTION FOR ADMINISTRATIVE SEGREGATION LAW LIBRARIES

1. Michigan Compiled Laws Annotated (Vol. 1-2, 38-39, 40-41)

   OR

   Michigan Statutes Annotated (Vol. 1, 24, 24A, 25, 25A)

2. A treatise on Michigan criminal law and procedure
3. Superseded "advance sheets" of Shepard's Citations (United States, Federal, and Michigan);
4. A treatise (e.g., Nutshell series) on prisoners' rights;
5. A treatise on habeas corpus;
6. A general treatise on criminal law and on criminal procedure;
7. A legal dictionary;
8. Federal rules of civil and criminal procedure;

9. A Michigan Department of Corrections Resident Guidebook; and

10. A list of the main law library holdings as periodically updated.

Gary KNOP, John Ford, William Lovett, II, Ramando Valeroso, Gus Jansson, Pat Sommerville, Vernard Cohen, T. John Spytma, Robert Shipp, Butch Davis, Ron Mixon, and Kerwin Cook, individually and on behalf of all other persons similarly situated, Plaintiffs,

v.

Perry M. JOHNSON, Robert Brown, Jr., Dale Foltz, John Jabe, Thedore Koehler, John Prelesnik, and Jack Bergman, Defendants.

No. G84-651.

United States District Court,
W.D. Michigan, S.D.

(Aug. 10, 1987)

Elizabeth Alexander, Adjoa Aiyetoro & Nkechi Taifa-Caldwell, National Prison Project, Washington, D.C., Patricia Streeter, Detroit, Mich., for plaintiffs.

Thomas Nelson, Brian McKenzie, David Edick, Michigan Office of the Atty. Gen., Lansing, Mich., for defendants.

OPINION

ENSLEN, District Judge.

This is a prison case that concerns conditions of confinement at four major prisons in the Michigan system. It is a class action proceeding in which the plaintiff class is composed of all prisoners who are or will be confined by the Michigan

Department of Corrections at the State Prison of Southern Michigan ("SPSM"), located in Jackson, Michigan; the Michigan Reformatory ("MR"), located in Ionia, Michigan; the Riverside Correctional Facility ("RCF"), also located in Ionia, Michigan; and the Marquette Branch Prison ("MBP") (including the former Michigan Intensive Programming Center ("MIPC"), which now is designated as A-Block of the MBP), located in Marquette, Michigan.

The defendants in the case are the Director of the Michigan Department of Corrections ("MDOC"), who now is Robert Brown, Jr.; the Deputy Director of the MDOC and the Director of the Bureau of Correctional Facilities, who now is Daniel Bolden; the Warden of the State Prison of Southern Michigan, who currently is John Jabe and who for most of the relevant time period was Dale Foltz; the Warden of the Michigan Reformatory, who currently is Pamela Withrow and who for most of the relevant time period was John Jabe; the Administrator of the Reception and Guidance Center, John Prelesnik; the Warden of the Marquette Branch Prison, Theodore Koehler; and the Warden of the Riverside Correctional Facility; who currently is Denise Quarles and who for part of the relevant time period was William Abshirer. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, new defendants automatically have been substituted for original defendants as they have succeeded them in office. The Court notes here that although Jack Bergman was named as a defendant in his former capacity as the Administrator of the MIPC, he effectively has been dropped from the action because the MIPC has been converted into A-Block of the MBP, under the control of Warden Koehler.

In their first amended complaint, filed on April 6, 1985, plaintiffs raised numerous grounds for relief against defendants. On March 20, 1986, the Court severed the following four

issues for immediate trial: (1) whether the lack of toilets and washbasins in certain locked cells at the RCF violates plaintiffs' Eighth Amendment right not to be subjected to cruel and unusual punishment; (2) whether defendants' alleged failure to provide plaintiffs with proper winter clothing also violates their Eighth Amendment right not to be subjected to cruel and unusual punishment; (3) whether defendants engage in racially discriminatory actions concerning job assignments, cafeteria serving lines, and the placement of inmates in administrative segregation, punitive detention, and protective custody in violation of plaintiffs' Fourteenth Amendment right to the equal protection of the law; and (4) whether defendants are unlawfully interfering with plaintiffs' constitutional right of access to federal and state court systems. This last issue includes the issue of whether defendants' system for handling inmates' incoming legal mail is constitutional. On May 14, 1986, the Court declined to sever for immediate trial plaintiffs' claim that defendants are not providing them with constitutionally adequate mental health care because it has conducted numerous hearings on that issue in connection with the Consent Decree entered in the related case of *United States v. Michigan*, No. G84-63 (W.D.Mich.).

After numerous pretrial motions, hearings, and other skirmishes between the parties, many of which Magistrate Rowland handled, the Court conducted a thirty-five day bench trial on the severed issues that was spread over five months; June 1986, August 1986, October 1986, March 1987, and April 1987. During the trial it listened to testimony from 103 witnesses — seventy-eight for the plaintiffs and twenty-five for the defendants — and received hundreds of exhibits into evidence. There remain some unresolved evidentiary motions that I will decide when I discuss the substantive issue to which the evidence pertains. In accordance with Rule 52(a) of the Federal Rules of Civil Procedure, the following opinion con-

constitutes the Court's findings of fact and conclusions of law on the severed issues.

Introduction to the Case

The prisoners who have brought this action are confined in Michigan's oldest and largest prisons. The Marquette Branch Prison, which is located in Michigan's Upper Peninsula, far away from the State's major population centers, is both a maximum security and a minimum security facility. The maximum security inmates are housed inside the walls of the prison. The inside prison has a rated capacity of 606 inmates, which is broken down into three groups; 249 administrative segregation cells; 262 cells for inmates in the general population group; and 95 protective custody cells. The administrative segregation units of the prison house the system's most difficult to manage inmates and is predominately black. Pls. Exh. 510B. The prison also has a trustee division, which houses the minimum security inmates and currently is predominately white. Pls. Exh. 521A. The staff of the institution is overwhelmingly white. Pls.Exh. 521Q; Transcript ("T") of 3-16-87 at 12. The protective custody unit, which used to be the MIPC, also is predominately white, although it is more evenly divided between black inmates and white inmates than the rest of the institution. T of 3-17-87 at 93.

The systems' largest facility is the State Prison of Southern Michigan, which is located in Michigan's Lower Peninsula near the major population centers of Lansing, Grand Rapids, and Detroit. The SPSM currently is composed of three complexes: the central complex, the south complex, and the north complex. The central complex houses close custody inmates, which is the security level just below maximum security, and includes inmates confined to administrative segregation and protective custody. Inmates confined in the central complex are involved in this case only on the racial discrimination claim. The

north complex is a medium security facility, while the south complex is a minimum security facility. The inmates confined in the central complex are overwhelmingly black; the racial compositions of the south and north complexes are more evenly divided between black inmates and white inmates.

The Michigan Reformatory and the Riverside Correctional Facility also are located in Michigan's Lower Peninsula. The MR houses both minimum security and close custody inmates. The minimum security inmates are housed in the institution's trustee division. The close custody inmates are housed inside the walls of the institution, are primarily if not exclusively under the age of twenty-five, and are predominately black. The RCF is located near the Reformatory and contains four housing groups that are relevant to this case: protective custody, administrative segregation, general population, and inmates going through reception or quarantine. Some of the cells in this institution do not have a toilet or washbasin inside the cell. Located in the same group of buildings as the RCF is the Riverside Psychiatric Center ("RPC"), which also contains some cells that do not have a toilet or washbasin within the cell.

[1] The Court will divide its discussion of the severed issues into five parts: (1) legal mail; (2) lack of adequate winter clothing; (3) lack of in-cell toilets and washbasins at the RCF and the RPC; (4) access to courts; and (5) racial discrimination. Following my discussion of the substantive issues, I will briefly discuss for the benefit of the parties the appealability under rule 54(b) and 28 U.S.C. § 1292 of my judgments on those issues. Since plaintiffs' claims generally implicate different constitutional provisions, I will discuss the applicable legal standards in connection with each substantive claim rather than in a general discussion at this point in the opinion. The Court does observe that one overriding standard it has considered and applied throughout this opinion is the substan-

tial deference it must give state prison officials, who have the difficult task of determining how to run their institutions. *See Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974). Due to considerations of comity and federalism, a federal court should hesitate to interfere in the operation of state prison systems, and should do so only when necessary to protect the constitutional rights of inmates. *See Kendrick v. Bland*, 740 F.2d 432, 437-39 (6th Cir. 1984). If a constitutional violation does exist, however, then it unquestionably is the Court's duty to remedy it. *See Rhodes v. Chapman*, 452 U.S. 337, 352, 101 S.Ct. 2392, 2402, 69 L.Ed.2d 59 (1981).

Rulings on the Severed Issues

I. *Plaintiffs' Legal Mail Claim*

The Court will divide its discussion of plaintiffs' legal mail claim into three parts. First, I will discuss the applicable legal standards. Secondly, I will discuss defendant's system of providing privileged treatment for inmates' incoming legal mail. Finally, I will discuss whether defendants' system is unconstitutional in any respect.

Inmates retain "all first amendment [and other constitutional] rights not incompatible with their status as prisoners, 'or with the legitimate penological objectives of the corrections system.' " *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir.1985), *quoting in part Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). The Supreme Court has recognized that in the context of incoming inmate correspondence, a penal institution's legitimate security needs justify certain measures that may infringe on inmates' First Amendment and Sixth Amendment rights, as well as their right of access to the courts. *See Procunier v.*

Martinez, 416 U.S. 396, 412-413, 94 S.Ct. 1800, 1810-1811, 40 L.Ed.2d 224 (1974). These measures, as with other measures affecting inmates' constitutional rights, are valid if they are "reasonably related" to the institution's security needs or other "legitimate penological interests". *Turner v. Safley*, ____ U.S. ____, ____, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64, 79 (1987). In evaluating whether a particular measure satisfies this standard, a court must examine whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; whether "the governmental objective [is] . . . a legitimate and neutral one"; whether "alternative means of exercising the right . . . remain open to prison inmates"; the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and whether there are any ready alternatives to the challenged regulation. *Id.* ____ U.S. ____, 107 S.Ct. at 2261-62, 96 L.Ed.2d at 79-80. In the legal mail context, prison officials bear the burden of putting "forth legitimate reasons for interfering with a prisoner's incoming mail." *Parrish v. Johnson*, 800 F.2d 600, 604 (6th Cir.1986).

The Supreme Court has held that prison officials may open legal mail sent to inmates and inspect it for the presence of contraband, although they cannot read the mail. *Wolff v. McDonald*, 418 U.S. 539, 574-77, 94 S.Ct. 2963, 2983-85, 41 L.Ed.2d 935 (1974). The Supreme Court indicated in *Wolff*, however, and several other courts have explicitly held, that an inmate has the right to be present when prison officials open his legal mail and inspect it for contraband. *Id.* at 577, 94 S.Ct. 15 2985; *see, e.g., Taylor v. Sterrett*, 532 F.2d 462, 475 (5th Cir. 1976); *see also Parrish*, 800 F.2d at 604 (citing cases). Employing the standard established in *Turner*, is it fair to say that the Supreme Court has already determined that a prison regulation that allows officials to open and to inspect an inmate's incoming legal mail for contraband is reasonably related to a

legitimate penological interest and thus is constitutionally valid, particularly if the inmate is allowed to be present during the inspection process. *See id.* at 603-04. The real issue in this case, thus, is whether there is anything about Michigan's system in particular that is unconstitutional.

Michigan's system for treating legal mail as privileged, meaning that plaintiffs have the right to be present when the mail is opened and inspected for contraband, is contained in two administrative rules and a policy directive. Administrative Rule 791.6603(4) provides that "[p]ursuant to a specific written request by a resident, mail which is clearly identified as coming from the resident's designated attorney or the corrections ombudsman shall be opened and inspected for contraband in the resident's presence." This rule clearly requires the inmate to invoke his right to be present when mail coming from his attorney, whom he must designate in advance, or from the corrections ombudsman is inspected for contraband. The second Administrative Rule, rule 791-6615(2), apparently supplements rule 791.6603(4) by providing that in addition to mail from an inmate's designated attorney and from the corrections ombudsman, prison officials shall treat as confidential mail communications between inmates and courts, public officials, the director of the Department of Corrections, and the corrections commission. Finally, Policy Directive PD-BCF-63.03 provides in pertinent part that "[u]pon written request by a prisoner to the institution's mail room supervisor, mail which is clearly designated as being from the prisoner's designated attorney, the courts, or from the Legislative Corrections Ombudsman, shall be opened and inspected for contraband in the prisoner's presence." This policy directive is similar to rule 791.6603(4), except that it clarifies that an inmate must send his request for confidential treatment to the mailroom supervisor for his institution and it encompasses mail from a court as well as mail from an attorney and the corrections ombudsman.

As the policy directive indicates, inmates must renew their request for confidential treatment of their legal mail each time they are transferred to a new institution. Pls. exh. 404-A at 12; *cf.* T. at 3131-33. The testimony at trial also indicated that each institution has a different method for handling privileged legal mail. At the SPSM and the MBP, once an inmate has notified the mailroom that he has an attorney, the mailroom makes a notation that any mail the inmate receives that is clearly marked as coming from an attorney (not necessarily the inmate's designated attorney), a court, or the corrections ombudsman is to be treated as privileged mail. T at 530. The MR employs a different system, however, under which mail from a court or the corrections ombudsman is automatically treated as privileged, but mail from an attorney is not treated as privileged unless the inmate specifically designates the attorney. *Id.* at 530-31; pls. exhs. 155 (grievance response) & 496 at 1.

The privileged mail policy, including the institutions differing interpretations of it, is not, moreover, adequately explained to the inmates. The resident guidebooks for the various institutions do not contain a clear and correct explanation of the policy. The guidebook for the SPSM-North Complex, pls. exh. 404-C, in fact contains no discussion of the policy, while the guidebook for the MBP is misleading in that it does not inform inmates they must take action to have their legal mail treated as a privileged communication. During the orientation process the inmates are given a general guidebook to read that does explain the privileged mail policy, and the policy is explained to them orally as well at that time. Pls. exh. 404-A at 12; 3-18-87 T at 24. An inmate is not allowed to keep this guidebook, however, and upon his arrival at an institution he is given that institution's guidebook. Copies of the general guidebook are not, moreover, readily available for inmates to read. Finally, on occasion inmates who have requested privileged treatment

for their legal mail find that their mail has been opened and inspected outside of their presence, although the Court is convinced that these openings are rarely, if ever, intentional.

Plaintiffs raise essentially three claims against defendants' legal mail policy. First, they argue that the policy improperly requires the inmates to invoke their right to be present when their legal mail is opened and inspected for contraband. Secondly, they argue that the institutions differing interpretations and applications of the privileged mail policy creates confusion among the inmates. Finally, they argue that many inmates are not aware of the policy. They request the Court to invalidate the requirement that inmates must request privileged status for their legal mail.

[2] The Court agrees that certain aspects of defendants' legal mail policy, both as it is written and as it is implemented, violate the inmates' constitutional right to be present when prison officials open their legal mail and inspect it for contraband. I do not find that defendant's policy unconstitutionally shifts to the inmates the burden of invoking this right. I agree that defendants bear the burden of putting forth legitimate reasons for their policy. The Supreme Court, though, already has sanctioned the "policy" of inspecting legal mail for contraband. The issue here is defendants' method of implementing the inmates' right to be present when that inspection occurs, *i.e.*, whether inmates should be required to opt-in to the system or be considered "in" the system and allowed to opt-out of it. The Court believes that this is the kind of decision that courts generally should leave to the discretion of prison officials. Plaintiffs have produced no evidence that defendants' decision to place the burden on the inmates by itself infringes on their First or Sixth Amendment rights or their right of access to the courts. *Compare Guajardo v. Estelle*, 432 F.Supp. 1373, 1381 (S.C.Tex.1977) (court found

no legitimate basis for a "requirement that inmates specially request that inspection of incoming attorney mail take place only in their presence") *aff'd in part and rev'd in part*, 580 F.2d 748 (5th Cir. 1978). The Court thus sees no basis for invalidating that requirement, even though I agree with plaintiffs that the reasons for this policy are at best obscure. See 3-17-87 T at 60-61. Plaintiffs simply have not supported their claim that the present system unduly increases the possibility that an inmate will erroneously be denied privileged treatment of his legal mail. At best, plaintiffs have established that isolated incidents of error occur in a system that handles thousands of pieces of mail. See 3-23-87 T at 59.

If defendants are going to use such a policy, however, they must implement it in a manner that will allow inmates a full and informed opportunity to invoke their right to be present when their legal mail is opened and inspected for contraband. I find that the way in which defendants presently administer their opt-in system does not achieve that goal. As the Court already has discussed, the guidebooks given to the inmates at the subject facility do not adequately explain the system. The Court cannot, moreover, accept defendants' contentions that inmates fully understand the system. There is no evidence that the general inmate guidebook, which does explain the system, is routinely available to the inmates; I cannot place much credence on the testimony of high level officials, such as Director Brown, who testified they did not know of any inmate confusion regarding the policy because such individuals are not in daily contact with the inmates; and plaintiffs produced evidence of confusion among both inmates and staff. *See, e.g.*, T at 1526-27; pls. exh. 169 (staff misstating the policy at MBP). Although the evidence on this point is not overwhelming, the Court finds it sufficient to establish that defendants' method of implementing their opt-in system unduly in-

fringes on the inmates right to be present when their legal mail is opened and inspected for contraband.

[3] In particular, the Court finds that there are three unconstitutional flaws in defendants' system. First, each institution implements the policy differently, and the differences are not adequately explained to the inmates. Indeed, even Director Brown did not know there are differences between the institutions. 3-18-87 T at 25. Second, an inmate must renew his request whenever he is transferred to a new institution. Given the number of transfers which the Court heard testimony on at trial, it finds that this requirement unduly infringes on the inmates' right to be present when their legal mail is opened and inspected. Finally, and most importantly, the requirement that an inmate specifically designate an attorney, at least as it is implemented at the Reformatory, can cause inmates unintentionally to waive this right. This situation can arise in two contexts. First, whenever an inmate is appointed an attorney in a case there is a chance that defendants will inspect the initial communication from that attorney to the inmate for contraband outside of the inmate's presence because the inmate will have been unable to notify the mailroom of the attorney's existence and identity. Secondly, in a class-action context, where one attorney or set of attorneys represent a number of inmates, the inmates similarly may be unable to invoke their right to be present when their legal mail is opened and inspected.

The Court accordingly will grant plaintiffs partial relief on this issue, and will require defendants to submit a revised system for allowing inmates to invoke their right to be present when their clearly marked legal mail, *i.e.*, mail from attorneys, the courts, and the corrections ombudsman, is opened and inspected for contraband that will remedy these constitutional defects. Defendants' submission will be due sixty (60)

days from the date of this opinion. Plaintiffs will have thirty (30) days to respond to the submission. The Court thereafter will issue a final judgment on the issue.

To provide some guidance for defendants, the Court observes that the revised system should contain the following features. First, it should cover mail from an inmate's attorney, from a court, and from the corrections ombudsman. *See Taylor*, 532 F.2d at 475. Secondly, the policy should be uniform throughout the subject institutions. Thirdly, an inmate should be given the choice during the orientation process of receiving privileged treatment for his clearly marked legal mail, and if he exercises his right to be present when the mail is inspected he should maintain that right whenever he is transferred among the subject institutions unless and until he decides to revoke his request. Fourthly, an inmate should not be required to designate a specific attorney, but rather only to state whether he wants privileged treatment for his legal mail. The requirement in rule 791.6603(4) that the mail be clearly identified as legal mail adequately informs prison officials that it may require special handling. *See Harrod v. Halford*, 773 F.2d 234 (8th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986). The Court believes that the SPSM's system for handling privileged mail, under which no specific attorney is designated but an inmate rather is simply marked as wanting privileged treatment for his legal mail, adequately protects the inmates'constitutional rights in this respect. See 3-23-87 T at 57-59 (testimony of Thomas Phillips). Finally, the Court recognizes plaintiffs' contention that on occasion their legal mail is read. I find no evidence that these incidents, if they occur at all, are widespread, however, and thus will grant plaintiffs no relief on that issue.

II. *Plaintiffs' Winter Clothing Claim*

Plaintiffs claim that defendants do not provide them with clothing that is adequate for Michigan winters. First Amended Complaint ¶ 47. The Eighth Amendment, which applies to the states through the Fourteenth Amendment, proscribes the infliction of cruel and unusual punishment. The Supreme Court has interpreted these words " 'in a flexible and dynamic manner' ", drawing upon objective criteria that reflect " 'the evolving standards of decency that mark the progress of a maturing society.' " *Rhodes*, 452 U.S. at 345-46, 101 S.Ct. at 2398-99 (citations omitted). Under the Eighth Amendment, a State may not incarcerate inmates under conditions that "involve the wanton and unnecessary infliction of pain," which includes "inflictions of pain . . . that are 'totally without penological justification' ", or under conditions that are "grossly disproportionate to the severity of the crime warranting imprisonment." *Id.* at 346-47, 101 S.Ct. at 2399 (citations omitted). In particular, conditions can be cruel and unusual if, considered alone or in combination, they "deprive inmates of the minimal civilized measure of life's necessities." *Id.*, at 347, 101 S.Ct. at 2399; *Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985).

[4] Several courts, including the Sixth Circuit, have stated that adequate clothing is one of the necessities of life of which State prison officials cannot deprive an inmate. *E.g., Bellamy v. Bradley*, 729 F.2d 416, 419 (6th Cir.1984), *cert. denied*, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1985); *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1410-11 (N.D.Cal. 1984); *aff'd in part, rev'd in part, vacated in part, and remanded*, 801 F.2d 1080 (9th Cir. 1986). An inmate is not entitled to the clothing of his choice, and prison officials do not violate the Constitution simply because the clothing they provide may not be aesthetically pleasing or may be illfitting. *See Williams v.*

Duckworth, 598 F.Supp. 9, 16 (N.D.Ind.1983), *aff'd mem.*, 749 F.2d 34 (7th Cir.1984); *Wolfish v. Levi*, 573 F.2d 118, 132-33 (2d Cir.1978), *rev'd and remanded on other grounds sub nom., Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). States must, however, provide inmates with clothing that is at least minimally adequate for the conditions under which they are confined. Prison officials thus violate the Constitution if they provide inmates with clothing that is "patently insufficient to protect [them] from the cold in the winter months." *Balla v. Idaho State Board of Corrections*, 595 F.Supp. 1558, 1575 (D.Idaho 1984). Inmates exposed to harsh winter conditions without proper winter clothing may indeed suffer "inflictions of pain" that are "totally without penological justification," in violation of the Eighth Amendment.

Defendants' clothing policy is set out in Policy Directive PD-BCF-51.01, which provides in pertinent part that "[a]ll newly committed prisoners" will receive an unlined jacket and that "[w]inter coats, blue corduroy headgear with earmuffs, and long underwear, if requested will be issued to prisoners employed outside in cold weather." In accordance with the policy, inmates are not provided gloves or boots unless they are assigned to an outside work detail, in which event they receive adequate winter clothing. *E.g.*, T at 1539-40; T at 1337; T at 2587; *see* defs. exhs. 385 & 387 (boots and vests). Inmates at the MR and SPSM in addition are not provided hats; most inmates at the MBP do receive knitted hats and at least some apparently receive long underwear as well. Pls exh. 397; T at 1379; T at 1963. The Court has examined the jackets that inmates generally receive during the orientation process. Pls. exhs. 511A & 511B. Exhibit 511A is a lightweight, unlined jacket that is totally inadequate for winter wear. Exhibit 511B is a similar jacket that has a medium-weight lining. Although it is a better winter jacket than exhibit 511A because

of the lining, exhibit 511B also is inadequate for winter wear. The Court can take judicial notice of the severity of Michigan winters, and firmly believes that both of these two jackets fail to provide inmates with adequate protection from the cold and snow. Inmates presented credible testimony about the jackets' inadequacy for winter wear. *E.g.*, T at 1963-64; T at 2023. Although there was not a significant amount of testimony about inmates becoming seriously ill due to exposure to the cold, the Court does not believe that inmates are required to establish that they have become seriously ill, or that some of them have died, before being entitled to relief from constitutional conditions of confinement. There was abundant evidence, moreover, that inmates, except possibly those confined in segregation units, have to go outside to go to meals, to use the telephone, when they are transferred to other institutions, to go to jobs and other appointments, and for recreational periods.

Defendants did introduce evidence at trial that they are producing and distributing a new coat, defs. exh. 315, that the court considers to be adequate for winter wear. 3-18-87 T at 119-26. Between March, 1985 and March, 1987 defendants had manufactured and shipped 17,286 of the new coats. *Id.*, at 120. A substantial portion of those coats had been sent to the subject facilities. *Id.* at 120-21. Well over half of the inmates at those facilities, however, did not have the new coat during the 1986-1987 winter. T at 242-47; T at 248-58. The Court observes here that it found both Mr. Hines and Mr. Valeroso to be very credible witnesses. In addition, defendants introduced no evidence that they have changed their policy concerning hats, gloves, and boots. Thus, the preponderance of the evidence demonstrates that defendants do not provide all inmates who are unable to provide adequate winter clothing on their own with an adequate winter coat, a hat, gloves and boots. Even inmates who possess their own coats, moreover,

must give them up when they are transferred, and risk never seeing them again.

[5] The Court finds, based on the facts in the record, that defendants are failing to provide inmates with adequate winter clothing. As I stated previously, the unlined coat and the coat with the light cotton lining are unsuitable for winter wear, and to force inmates to venture outside in them constitutes the infliction of substantial pain without an adequate penological justification. Moreover, inmates often are forced to forego outdoor exercise due to the lack of adequate winter clothing. Although exercise and other recreational pursuits are not necessarily a core concern of the Eighth Amendment, under certain circumstances a deprivation of recreational opportunities can violate the Constitution. *See Walker* 771 F.2d at 927-28. Inmates who lack adequate winter clothing, particularly those confined at the MBP where the winters are long and harsh, face a substantial risk of such a constitutional deprivation. *See* T at 1964-66. Even if this were not the case, however, the Court finds, as it stated previously, that defendants are violating the Constitution by exposing inmates to winter weather without providing them with adequate clothing.

The Court realizes that defendants now are manufacturing an acceptable winter coat. As I already have found, however, a majority of the inmates at the subject facilities do not have it. Defendants' official policy, moreover, pls. exh. 396, requires only that inmates be given an unlined jacket. The Court thus believes it properly can order defendants to provide adequate winter coats, and that this issue is not moot and does not fall under *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985), for two reasons. First, a majority of the inmates at the subject facilities have not yet received the new coat. Second, a voluntary cessation of unconstitutional conduct does not preclude a court from granting injunctive

relief where it is not convinced that the unconstitutional conduct will not reoccur. In this case, the Court is not so convinced because defendants' official policy on coats has not changed. Finally, defendants produced no evidence that they routinely provide inmates with gloves, hats, and boots. The Court finds that hats and gloves or mittens are required winter clothing at the subject facilities. The Court also finds, however, that boots are not required if inmates are given adequate winter socks and if walkways and outdoor exercise areas are kept free of snow.

One final point the Court will discuss on this issue is defendants' claim that they are not responsible for any constitutional deprivations that may be occurring. Due to the Eleventh Amendment, and under the doctrine of *Ex Parte Young*, plaintiffs have sued defendants in both their official and individual capacities. The Supreme Court recently clarified that "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 167, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114, 121 (1985). Given the Eleventh Amendment, the only way a plaintiff can reach state action is to sue individual officers of the State in their official capacities. *See id.* 473 U.S. 159, 165, 105 S.Ct. at 3106 n. 14, 87 L.Ed.2d at 122 n. 14 ("implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State"). In an official-capacity action, however, "a governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation." *Id.* 473 U.S. at 167, 105 S.Ct. at 3106, 87 L.Ed.2d at 122 (citation omitted). The Court thus must apply the *Monell* standard, *see Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), in deciding whether defendants are

responsible for any constitutional deprivations plaintiffs may be suffering. *See Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987). This standard is similar to the standard for supervisory liability that the parties have argued in their written submissions. *See Hays v. Jefferson County*, 668 F.2d 869, 872-74 (6th Cir. 1982), *cert. denied*, 459 U.S. 833, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982). The Court need not discuss this issue further at this time, however, because defendants' actions and inactions regarding winter clothing clearly represent official policy, and it is pursuant to official policy that plaintiffs' constitutional rights are being violated.

In accordance with the above discussion, the Court will grant plaintiffs relief on this issue, and will enter a judgment, enjoining defendants to provide inmates with constitutionally adequate winter coats, hats, gloves, and, under specified circumstances, boots. Inmates are exempt from this order if they are confined in areas where they do not have to go outside during the winter. Defendants, however, must provide adequate winter clothing to inmates during all institutional transfers.

III. *Plaintiffs' Lack of Access to Toilets Claim*

Plaintiffs' third claim concerns only those inmates who are confined at the RCF and the RPC. Certain cells in these two buildings do not have toilets and washbasins in them. Consequently, inmates must use central lavatory facilities. This lack of in-cell sanitary facilities has caused inmates on occasion to have to urinate and to defecate in their cells in nonflushable receptacles. Plaintiffs contend that this situation violates their right under the Eighth Amendment not to be subject to conditions of confinement that constitute cruel and unusual punishment. Defendants respond that they have a system for releasing inmates from their cells to use the central lavatory facilities

that works well, with only occasional sporadic breakdowns, and that no inmate is suffering from cruel and unusual conditions of confinement simply because he does not have a toilet and a washbasin in his cell.

As the Court discussed previously in connection with plaintiffs' winter clothing claim, the Eighth Amendment prohibits States from incarcerating inmates under conditions that, among other things, involve the wanton and unnecessary infliction of pain. This standard encompasses inflictions of pain that are totally without penological justification and conditions of confinement that deprive inmates of the minimal civilized measures of life's necessities. Among the necessities of life the Eighth Amendment protects is sanitary living conditions and personal hygiene. *Walker,* 771 F.2d at 926 & 928. The amendment, moreover, also reaches out to protect the basic dignity of man, which is its primary underlying concept. *Trop v. Dulles,* 356 U.S. 86, 100, 78 S.Ct. 590, 597, 21 L.Ed.2d 630 (1958) (plurality opinion); *see Gregg v. Georgia,* 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (plurality opinion). It ensures that the State exercises its power to punish "within the limits of civilized standards." *Trop,* 356 U.S. at 100, 78 S.Ct. at 598. In the context before the Court, where prison officials are not required to balance against the safety and constitutional rights of inmates "competing institutional concerns for the safety of prison staff and other inmates," inmates need not prove "[a]n express intent to inflict unnecessary pain." *Whitley v. Albers* 475 U.S. 312, ____, 106 S.Ct. 1078, 89 L.Ed.2d 251, 260-62 (1986). Although mere "inadvertence or error in good faith" will not constitute cruel and unusual punishment, prison officials cannot unnecessarily and wantonly inflict pain on inmates. *Id.* 475 U.S. at 1084, 106 S.Ct. at ____, 89 L.Ed.2d at 260-61.

When faced with a situation where inmates are confined in cells without toilets and washbasins and are forced to depend on corrections officials for access to those facilities, courts can and have followed one of three different approaches. First, a court can find that it is a *per se* violation of the Eighth Amendment to confine an inmate in a situation where he may have to defecate or urinate in a nonflushable toilet or other receptacle, particularly when the inmate has no means of cleansing himself after performing his bodily functions. Several courts have followed this approach, finding that it violates the Eighth Amendment to "lock[] a person, for any significant period of time, in a cell lacking a flush toilet and a washbowl." *Flakes v. Percy*, 511 F.Supp. 1325, 1332 (W.D. Wisc. 1981); *see also LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir.1972) ("Causing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted"), *cert. denied*, 414 U.S. 878, 94 S.Ct. 49, 38 L.Ed.2d 123 (1973); *Strachan v. Ashe*, 548 F.Supp. 1193, 1202 (D.Mass.1982) (objecting to the use of a "soil pot"); *Heitman v. Gabriel*, 524 F.Supp. 622, 626 (W.D.Mo.1981) ("[n]o inmate shall be confined for more than one hour in any locked cell which does not have working plumbing"); *Wolfish v. Levi*, 439 F.Supp. 114, 157 (S.D.N.Y.1977) ("it falls today below an acceptable level of humaneness to confine a prisoner of any sex where he or she must solicit freedom to use a toilet"), *rev'd and remanded*, 573 F.2d 118 (2d Cir.1978); *rev'd in part and remanded on other grounds sub nom., Bell v. Wolfish*, 411 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Negron v. Preiser*, 382 F.Supp. 535, 539 n. 4 & 543 (S.D.N.Y.1974) (declining to find a constitutional violation where "only those patients who are free to leave the cells when they choose, or those patients who are so acutely agitated that they overly threaten to use the toilet facilities to harm themselves or others" will be confined in cells without

toilets); *cf.*, *Groseclose v. Dutton*, 609 F.Supp. 1432, 1437 (M.D.Tenn.1985) (noting potential problems where "meals must be eaten in the cells, often near a malodorous cement commode"), *appeal dismissed*, 788 F.2d 356 (6th Cir.1986); *Blake v. Fair*, 563 F.Supp. 836 (D.Mass.1983) (finding unconstitutional conditions where, among other things, inmates were confined in a cage area without a toilet or a sink).

A second approach would be to consider that a constitutional violation occurs in a class action context only when the prison's system of releasing inmates to use toilet facilities is inadequate, and instances of inmates not being released to use the facilities are sufficiently frequent that they face a substantial risk of being forced to defecate or urinate in their cells and not being able readily to dispose of their body wastes. Under this approach, a court may grant injunctive relief only if it finds a pattern or practice of noncompliance with a regular release program, or the absence of such a program. *See Osborn v. Manson*, 359 F.Supp. 1107, 1112 (D.Conn. 1973) (holding that defendants may confine inmates in cells without toilets if the inmates are "permitted to use bathroom facilities at reasonable intervals and . . . permitted to exercise outside their cells for one hour per day"); *cf. Dimarzo v. Cahill*, 575 F.2d 15 (1st Cir.1978) (upholding district court order that did not require defendants to install toilets in cells but only to install them "at the site of existing water and sewer lines"), *cert. denied*, 439 U.S. 927, 99 S.Ct. 312, 58 L.Ed.2d 320 (1979). Prison officials do not violate the Constitution, this approach holds, merely because they confine inmates in cells without toilets and inmates occasionally are forced to defecate or urinate in their cells without the benefit of a flushable toilet and a washbasin.

A final approach would be to hold that prison officials violate the Constitution only if the conditions of confinement pose a serious risk of harm to the inmates' health. Under this ap-

proach, even a pattern or practice of inmates not being released to use the bathroom facilities, and thus being forced to defecate or urinate in their cells, would not violate the Constitution if it did not pose a serious risk of harm to the inmates' physical health. *See Miles v. Bell*, 621 F.Supp. 51, 61 (D.Conn.1985) (finding that forcing dormitory inmates to wait to use the bathroom does not cause "significant adverse health effects"; the court contrasted the situation, however, with one where inmates may experience "serious problems of toilets that [do] not flush, leaking toilets, wet floor and water shutdowns"); *cf. Shrader v. White*, 761 F.2d 975, 986 (4th Cir.1985) (finding food service conditions adequate where there was "no evidence of outbreaks of food poisoning, diarrhea, or other diseases which are indicative of unhealthy conditions in the preparation or handling of food"); *Grubbs v. Bradley*, 552 F.Supp. 1052, 1123 (M.D.Tenn.1982) (the Eighth Amendment requires conditions that are "sanitary enough so that inmates are not exposed to an unreasonable risk of disease"); *Collins v. Haga*, 373 F.Supp. 923, 926 (W.D.Va.1974)(the court found sanitary conditions to be adequate, in part because "there is no indication that any inmate has become ill by reason of the conditions").

[6] Having reviewed the case law and the parties' written submissions on this issue, the Court concludes that the first view properly interprets and implements the core values of the Eighth Amendment. It is too late in the development of our societal values to permit prison officials to confine inmates in cells where they do not have free access to toilet facilities and a washbasin. I fully agree with the Court of Appeals for the Second Circuit that "[c]ausing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted." *LaReau*, 473 F.2d at 978; *see also Bel v. Hall*, 392 F.Supp. 274, 277 (D.Mass. 1975) ("[d]eprivation of elementary sanitary facilities

automatically and without having disobeyed any of the institutional rules is not only hazardous to health but connotes an institutional disdain for the inmates which is bound to have a cumulative effect and to produce in them feelings of depression and despair''). Exposing an inmate to a situation where he may be forced to defecate or urinate in his own cell without the presence of proper toilet facilities or a washbasin violates the basic human dignity the Eighth Amendment protects. *See Flakes*, 511 F.Supp. at 1329-32.

[7] Even if I were to follow the second approach, moreover, the evidence in this case, which I will discuss in the following paragraphs, is more than adequate to support a finding that defendants are violating the Eighth Amendment rights of those inmates confined at the RCF who do not have access, *i.e.*, without staff assistance, to toilet facilities and washbasins. Plaintiffs have established by more than a preponderance of the evidence that defendants do not adequately provide these inmates necessary access to toilet facilities and a washbasin, and thus subject them to a substantial risk of having to defecate or urinate in their room without the benefit of a flushable toilet or a washbasin.

Finally, the Court must reject the third approach, which defendants urge me to adopt. In this context, I believe that requiring plaintiffs to establish that they face a substantial risk of physical harm due to the conditions at the RCF does not give proper weight or respect to the somewhat intangible value of human dignity. The evidence does demonstrate, however, that inmates who are forced to defecate and urinate in their cells at the RCF are exposed to a health risk. See T at 743-47 & 758-60. The Court found Mr. Duel's testimony on this point to be specific and credible. Although Mr. Duel could not quantify the health risk posed to the inmates, the Court finds that a not insubstantial risk does exist, particularly given that in-

mates are not always provided adequate facilities and materials for cleaning their urinals, *i.e.*, they often have to clean them in the same sinks in which they brush their teeth and wash up and often are given no cleansers to use. T at 1032 & 1055-56 (R&GC); T at 1059, 1414-15, 1806, & 1889 (Protective Custody); T at 1076 & 1093-94 (Administrative Segregation); and T at 1734 (RPC).

To compensate for the lack of toilets and washbasins in certain cells at the RCF and the RPC, defendants attempt to maintain a policy of allowing inmates out of their cells to use the toilet facilities. Since defendants' policy tends to vary with each housing group at the institutions, the Court will discuss it in connection with a separate discussion of the status of each group. Defendants also maintain a regular policy of cleaning the hallways and other common areas at these facilities, and of providing inmates with ample opportunities to clean their own cells on a regular basis. The Court specifically finds that the RCF and the RPC generally are clean facilities, that defendants maintain clean hallways, and, with the exception of areas where urine may be spilled on the floor, see pls. exh. 376a, that the cells are clean. Defs. exhs. 373, 374, 378, 379, & 381. The issue in this context, however, is not necessarily the general sanitary condition of defendants' physical facilities, but whether inmates are given adequate access to toilet facilities. I will discuss this issue separately for each of the four population groups that defendants house at the RCF and the RPC.

The first population group the Court will discuss is the inmates confined in the Reception and Guidance Center, which is located in 7-Building on the first and second floors. Sixty-seven of the cells on the first floor and sixty-three of the cells on the second floor of seven building do not contain toilets or washbasins. Pls. exh. 27 at 13. Inmates are confined in this

facility for an average period of two weeks while they are going through orientation and awaiting transfers to other institutions. 4-24-87 T at 20. During that two-week period, they are locked in their cells approximately eighteen hours per day and are allowed out of their cells three times a day for meals and once a day for recreation. Pls. exh. 388; T at 1353-54. They are given a urinal on their arrival at the Reception Center and are told to use it, and to attempt to attract the attention of an officer if they have an emergency. T at 1033, 1054, & 1353. At least two inmates were given a used urinal. T at 1414-15 & 1742. Several inmates testified that they were forced to use the urinals, and on occasion even to defecate in their cells, because they were unable to use the regular toilet facilities. T at 1033 (urinate); T at 1054 (urinate); T at 2298 (urinate); T at 1061 (urine in courtyard from inmates in 7-2 quarantine); T at 2296-7 (defecate); T at 2298 (urinate). This testimony was buttressed by testimony of urine and feces being thrown into the courtyard by inmates confined in the Reception area and the Protective Custody area. T at 1046 (feces and urine); T at 1061-62 (feces and urine); T at 1068 (feces and urine); T at 1078-79 (feces); T at 1417 (inmates in quarantine dumping urinals); T at 1436-37 (feces and urine); T at 1707 (feces); & T at 1885 (inmate dumped urinal out of window).

The Court does not find that inmates throw urine and feces into the courtyard on a daily basis. I do find however, that it occurs often enough to support a finding that defendants fail to provide inmates in the Reception area with regular access to bathroom facilities and that such inmates often are forced to urinate and defecate in their cells. In this regard, I specifically find that Mr. Waterman's trial testimony was not credible and was insufficient to rebut plaintiffs' evidence. It was not credible because it contradicted his detailed deposition testimony on this issue. Even if it were credible it was insufficient because Mr. Waterman did not deny at trial that inmates

frequently throw urine and feces out the windows; he merely stated that it was not a "daily" occurrence. 3-25-87 T at 146.

Defendants in their post-trial submissions have pointed the Court to nothing in the record demonstrating that they provide inmates confined at the Reception Center with regular access to bathroom facilities. The logs they submitted in support of their claim that they provide inmates with such access apparently concern only the protective custody and administrative segregation units. See pls. exh. 362. As I will discuss later in this opinion, moreover, even those logs do not adequately support defendants' position. In summary, the preponderance of the evidence demonstrates that inmates confined in the Reception area are expected to use their urinals, do use their urinals in their cells, and on occasion even are forced to defecate in their cells. The Court already has found, moreover, that defendants do not always provide these inmates with adequate cleaning materials for their urinals.

The second population group housed in seven building is the protective custody unit, which is housed on the third floor of the building. Ninety-six of the cells on this floor do not have toilets or washbasins. Protective custody inmates are locked in their cells during the night, from approximately 10:00 or 11:00 p.m. to approximately 6:00 or 6:30 a.m. During the day they generally are out of their cells on assignments or just around the housing unit. Pls. exh. 27 at 14-15; see T at 1034. As with the Reception Center inmates, inmates in protective custody are provided with urinals and are told to use them. 3-23-87 T at 107; T at 1040; T at 1704. Several inmates testified that they have had to urinate and to defecate in their cells because they could not get out to use the toilet facilities. T at 1040-44 (defecate and urinate); T at 1059-61 (defecate and urinate); T at 1415-17 (defecate); T at 1430-31 (defecate);

T at 1704-05 (defecate); & T at 1886-88 (defecate). This testimony also was buttressed by testimony that inmates confined in the protective custody units dump urine and feces out of their windows.

Defendants established on their cross-examination of some of the inmates that correctional officers frequently let inmates out during the night to use the toilet facilities. T at 1708-09; T at 1903. The bathroom logs defendants submitted, moreover, also demonstrate that the correctional officers frequently let inmates out of their cells during the night to use the facilities. Such logs do not, and cannot, however, indicate the number of times the correctional officers have ignored inmate requests to use the toilet facilities. The Court finds that plaintiffs have established by a preponderance of the evidence that inmates frequently are forced or required to urinate or to defecate in their cells, and face a substantial risk of not being allowed to use the toilet facilities when they need to do so. Finally, as I already have found, defendants do not always supply these inmates with adequate cleaning supplies for their urinals, and on occasion have provided inmates with used urinals. T at 1058-59.

Defendants argue that the Court should not consider the situation of the protective custody inmates because they are phasing out that unit and are replacing those inmates with general population inmates, who are given access to toilet facilities. Warden Quarles testified at trial that defendants are converting the protective custody unit to a general population unit, and expect to finish that project by the summer. 4-24-87 T at 21-22. The Court has no evidence, however, that this transition actually has occurred. I agree with plaintiffs, moreover, that even if the transition actually has occurred defendants have failed to demonstrate that " 'there is no reasonable expectation . . . ' that the alleged violation

will recur." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (*quoting in part United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 898, 97 L.Ed. 1303 (1953)). Absent some kind of assurance that defendants will only confine in these cells inmates who will have free access to toilet facilities, without staff assistance, the Court believes it properly can enjoin any unconstitutional conditions that exist regarding the lack of toilets in them.

The third population group housed in seven building is the administrative segregation unit. These inmates are confined in their cells most of the time, being allowed out only to use the toilet facilities and for a daily recreation period of one hour. Pls. exh. 29 at 17. There are approximately twenty inmates confined in the segregation unit. Defs. exh. 313. Correctional officers make regular bathroom runs four or five times a day, during which time inmates are allowed out of their cells to use the toilet facilities. Pls. exh. 369; Seg.Record dated 11-18-85. In addition, correctional officers make rounds on the unit every one-half hour, during which time inmates can request to be allowed to use the toilet facilities. 4-24-87 T at 19; pls. exh. 27 at 15; pls. exh. 29 at 21.

These requests are not always granted, however, particularly during the late night and early morning hours. Defendants' green log book for the segregation unit indicates that inmates are occasionally allowed out of their cells during the early morning hours to use the toilet facilities. Once again, however, the logs do not reflect the times when an inmate is not allowed out of his cell to use the facilities. *See* T at 1091-93; T at 1890-91; T at 1077. Plaintiffs' evidence of administrative segregation inmates being forced to defecate or urinate in their cells is less convincing than their evidence on inmates confined in protective custody and in the Reception Center.

Instances of these inmates being forced to urinate or defecate in their cells present significant constitutional concerns, however, because they are locked in their cells most of the time and must eat their meals in their cells. See pls. exh. 30 at 11; pls. exh. 29 at 14-15. They are not, moreover, always allowed to wash themselves before mealtimes. T at 1094; T at 1077. Under such circumstances, the Court finds that defendants are violating the Eighth Amendment rights of the administrative segregation inmates by confining them in cells without toilets or washbasins.

As a concluding note on the administrative segregation inmates, the Court observes that the parties dispute whether the current American Correctional Association standards for Adult Correctional Institutions require defendants to give inmates in segregation units free access to toilet facilities. Defendants argue that standard 2-4130 of the January 1986 supplement indicates that prison officials are not required to provide inmates in segregation units with free access to toilet facilities. Plaintiffs respond that the January 1986 revisions did not affect standard 2-4135, which does require prison officials to provide inmates in segregation units with free access to toilet facilities. Plaintiffs attached standard 2-4135 to their post-trial brief on this issue. The Court believes that plaintiffs probably have the better of this argument. I do not find the ACA standards on this issue to be persuasive one way or the other, however. This is one issue on which the Court finds expert opinion to be helpful, but not persuasive. *See Rhodes*, 452 U.S. at 348 n. 13, 101 S.Ct. at 2400 n. 13.

The final population group the Court will consider is the inmates confined in the Riverside Psychiatric Center, which is in 11 building. Forty-eight of the rooms in the east wing of this building do not have toilets or washbasins in them. Most of the inmates confined in these rooms are not locked in their

cells and are allowed free access to toilet facilities, except during the relatively brief count times. 3-25-87 T at 148 & 159. Some inmates, however, are in seclusion, during which time they are not free to leave their cells to use the toilet facilities. *Id.* at 151-52. Approximately one to three inmates may be on seclusion at a time in the east wing of the building, although the number could be as high as twelve. *Id.* at 152-53 & 157. Many of these inmates take psychotropic medications that increase their thirst for liquids, and consequently also increase the frequency of their urination. T at 3300-04.

To cope with this problem, defendants occasionally place urinals in the seclusion cells. 3-25-87 T at 157. These inmates also are offered a toilet break every two hours and are checked every fifteen minutes, during which time they may request to use the bathroom. *Id.* at 152. It appears, however, that nurses occasionally may delay allowing an inmate in seclusion to use the bathroom if he or she believes the inmate is merely playing games. *Id.* at 159. In addition, there is evidence that not more than two inmates are allowed out of their rooms at any one time to use the bathroom facilities. See pls. exh. 368. Finally, there was some evidence that inmates confined at the RPC in cells without toilets have urinated and defecated in their cells. T at 1736-37 & 1740-41; T at 1897.

Defendants contend that even inmates in cells with toilets at the RPC occasionally urinate and defecate in their cells, and that "the problem in 11 building has more to do with the medical problems of individual inmates, rather than the physical plant." They cite to Dr. Bort's deposition testimony, introduced by the plaintiffs, in support of their contention. The Court has reviewed the admitted portions of Dr. Bort's deposition and finds nothing in them indicating that inmates in cells with toilets urinate and defecate on the floor of the cell. Dr. Bort did testify at his deposition, however, that the State

Department of Mental Health is opposed to placing toilets in the cells at Riverside. Pls. exh. 4 at 11. Plaintiffs' psychiatric expert, Dr. Rundle, testified, moreover, that patients may urinate and defecate on the floor even when they have direct access to toilet facilities and that most mental health hospitals have some seclusion rooms without toilets and sinks. T at 3314. Dr. Rundle did indicate he disagrees with defendants' use of the seclusion rooms at Riverside and with the Department of Mental Health's rationale for not wanting toilets in the cells. T at 3314-16.

In accordance with the above discussion, the Court concludes that defendants are violating the Eighth Amendment by confining inmates in cells without toilets or washbasins at the RCF and not allowing such inmates free access to central toilet facilities. The basis for the Court's holding differs for the various population groups confined at this facility. With respect to the inmates confined at the Reception Center and in protective custody, the preponderance of the evidence clearly demonstrates that these inmates are not allowed adequate access to the central toilet facilities, and often are required to urinate or defecate in their rooms without the benefit of a flushable toilet facility. Defendants, moreover, expect inmates to use the urinals they give them when they first enter the facility. Under both the first and second of the three approaches to this issue it discussed at the beginning of this section, the Court finds that defendants are violating the Eighth Amendment rights of inmates confined in the Reception Center and in protective custody. Simply put, it violates the basic dignity of these inmates to require them to urinate and to defecate into improper containers and to live in close proximity to their body wastes. Defendants are using a medieval building in the 1980s.

The situation is a little different for the inmates in the administrative segregation unit and the inmates in the Riverside

Psychiatric Center. Defendants have established that inmates in the administrative segregation unit generally are allowed access to toilet facilities. The Court cannot, however, ignore the significant risk, which plaintiffs have established exists, that these inmates may be required to defecate or urinate in their cells, particularly in the late night and early morning hours. This risk is exacerbated by the lack of washbasins or other cleaning materials in the cells and by the fact that these inmates are forced to eat in their cells, often times without the opportunity to clean up before the meal. The Court thus finds that defendants' treatment of the administrative segregation inmates at the RCF also violates the Eighth Amendment. It violates the Eighth Amendment to lock an inmate, for any significant period of time, in a cell without an operable toilet and washbasin. Even though the administrative segregation inmates are not forced to urinate or defecate in their cells as frequently as the Reception Center and protective custody inmates are, the risk that they will have to do so exists and it is defendants' official policy of not having toilets or washbasins in those cells which subject them to that risk.

[8] The Court declines to find an Eighth Amendment violation with respect to those inmates confined at the RPC. The only Eighth Amendment problem in this unit concerns inmates who are on seclusion status. Inmates who are not in seclusion have regular access to toilet facilities, and I cannot accept plaintiffs' argument that I should issue an order covering all of the cells in eleven building simply because defendants may at some time use them for other purposes. The evidence produced at trial established that defendants currently limit toilet access only for inmates in seclusion; there was little, if any, evidence that this policy may change in the future. With regard to the seclusion inmates, I cannot ignore Dr. Bort's testimony that the Department of Mental Health is opposed to placing toilets in the cells and Dr. Rundle's testimony that

mental health hospitals have and employ seclusion rooms that do not have toilets or washbasins. Dr. Rundle indicated that defendants are not properly employing the seclusion rooms at Riverside, but plaintiffs produced no other evidence on that issue. I thus cannot find that it violates contemporary standards of decency for defendants to confine inmates at the RPC in seclusion cells without toilets or washbasins.

The Court thus will enter an order granting plaintiffs partial relief on this issue. Since it is defendants' official policy to confine inmates at the RCF in cells without toilets, there can be no question as to their responsibility for the constitutional violations that are occurring. I am not unsympathetic, however, to defendants' need for these administrative segregation and protective custody cells. I therefore will not, at this time, adopt plaintiffs' suggestion that I enjoin defendants from confining any inmate, absent emergency conditions, in a cell without an operative toilet and washbasin for more than forty minutes. Rather, I will give defendants sixty (60) days from the date of this opinion to produce a plan for remedying the deficiencies that exist at the RCF. Plaintiffs shall then have thirty (30) days to comment on the plan. The Court thereafter will either accept defendants' plan, order defendants to produce a revised plan, or impose its own plan on defendants.

IV. *Plaintiffs' Access to Court's Claim*

Plaintiffs' fourth claim is that defendants are denying them their constitutional right of access to the courts by failing to satisfy their obligation to assist inmates "in the preparation and filing of meaningful legal papers by providing" them "with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977). Before discussing the merits of plaintiffs' claim, the Court will address two preliminary matters.

The first preliminary matter concerns the case of *Walker v. Johnson* which was remanded, in part, by the Sixth Circuit to the District Court for the Eastern District of Michigan in 1985. *Walker v. Mintzes*, 771 F.2d 920 (6th Cir.1985). One of the issues discussed by the Sixth Circuit, and remanded to the District Court, was whether the Michigan prison system provides inmates confined at the SPSM, the MR, and the MBP with adequate access to the courts. The class of inmates involved in the *Walker* proceeding apparently is the same class of inmates that is involved in this proceeding. Unfortunately, neither of the parties to this case informed the Court that the Sixth Circuit had remanded the access to courts issue to Judge Newblatt for further proceedings, or requested the Court to stay any proceedings on that issue since it already was before Judge Newblatt. Defendants did file a motion for partial dismissal on September 25, 1985 that was based in part on the *Walker* decision. They did not discuss the access to courts issue in their motion and brief, however, and did not request the Court to defer to the proceedings before Judge Newblatt. The Court realized for the first time the nature of the issue and the status of the proceedings before the Eastern District as it was preparing this opinion.

It may be regrettable that there have been two federal court proceedings involving the same issue and the same class of inmates. Nevertheless, given the status of these proceedings, I see no reason not to decide plaintiffs' claim. It simply is too late in the game for me not to decide the access to courts issue. In addition, I note that Judge Newblatt issued his decision in 1982. I have no idea what evidence Judge Newblatt had before him and have only his opinion as evidence of the condition of Michigan's law library system at that time. The Court thus does not believe it is in any way precluded from ruling on plaintiffs' claim, except of course to the extent that it must follow the Sixth Circuit's rulings in *Walker* on this issue.

The second preliminary matter is defendants' April 23, 1987 request that I take judicial notice of state and federal court records concerning lawsuits brought by three inmates who testified on the access to courts issue. Defendants contend that these records impeach part or all of the witnesses' testimony and indicate that they provide inmates with adequate access to the courts. Plaintiffs oppose defendants' request. They argue, in essence, that the Court should not grant the request because defendants waited until the last moment to file it, and thus precluded them from presenting rebuttal evidence, and because the Court had prevented them from submitting rebuttal grievances on the ground that defendants would not have an opportunity to explain or to rebut the grievances.

Rule 201(d) of the Federal Rules of Evidence provides that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Paragraph (e) of the rule provides that a party is entitled to "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed" while paragraph (f) states that "[j]udicial notice may be taken at any stage of the proceeding." As defendants argue, courts routinely take judicial notice of court records. *E.g. E.I. Du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir.1986); *Moore v. Estelle*, 526 F.2d 690, 694 (5th Cir.1976); *cert. denied*, 426 U.S. 953, 96 S.Ct. 3180, 49 L.Ed.2d 1192 (1977). Moreover, also as defendants argue, the records they seek to introduce are relevant to this proceeding. Plaintiffs do not contest the records' accuracy or, for the most part, their relevancy.

[9] Rule 201 and the cases defendants cite in their briefs seemingly require the Court to take judicial notice of the court records. I believe, however, that the rule is not as mandatory as it appears to be, and under the peculiar circumstances of

this case deny defendants' request. I base my decision on three grounds.

First, judicial notice is an alternative means of proof that is subject, like all other offers of evidence, to rules 403 and 611(a). *See Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 301-02, 57 S.Ct. 724, 729, 81 L.Ed. 1093 (1937) (''notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence''; '' '[i]t does not mean that the opponent is prevented from disputing the matter by evidence if he believes it is disputable' '') (citation omitted); *Colonial Leasing Co. v. Logistics Control Group Int'l*, 762 F.2d 454, 461 (5th Cir. 1985) (''it is clear that the court's power to take judicial notice 'at any stage' may be circumscribed by other considerations''). Secondly, defendants did not give plaintiffs fair notice of their intent to request the Court to take judicial notice of the court records. The relevant witnesses testified in August, 1986 (August 13th (Kingon) August 15th (Kemp-Bey), and August 25th (Cade)). Yet defendants did not produce court records until April 23, 1987, only five days (including two weekend days) before the end of trial, thereby effectively denying plaintiffs any opportunity to present the three inmates as rebuttal witnesses. Arguably plaintiffs were able in their June 9, 1987 reply brief to rebut any inferences the Court could draw from the records. Normally, the Court would accept such a written submission in lieu of live rebuttal testimony. I decline to do so here, however, because the credibility of the witnesses is important and defendants are in effect offering the records in lieu of, or as a supplement to, their cross-examination of the inmates.

Finally, defendants' request simply strikes me as being unfair, and I believe that it would be inconsistent with my other evidentiary rulings to grant it. I have tried to be fair to both

parties in admitting evidence while remaining cognizant of the fact that I must determine what conditions presently exist in the subject institutions. In trying to achieve these goals, I have excluded some evidence I arguably should have admitted and have admitted some evidence I arguably should have excluded. In this instance, given defendants' inexcusable delay in requesting me to take judicial notice of the court records, I deny their request. I note, however, that the records concern only three of the inmates who testified on the access to courts issue and that even without this testimony, plaintiffs produced sufficient evidence to satisfy their burden of proof.

Turning now to the merits of the plaintiffs' claim, this was a difficult issue to decide. As I will discuss, plaintiffs' proofs, although adequate, were not overwhelming. In addition, the published case law is in conflict, with courts enunciating interesting, thoughtful, and sometimes widely varying views on access to the courts. This also is an area in which this Court, like most other federal district courts, has substantial personal knowledge of the issues and of the difficulties inmates face in presenting their concerns to a court. I have reviewed numerous prisoner petitions, some of which were well-written and well-researched, and others of which reflected a complete lack of legal knowledge and of the ability to write coherent sentences and paragraphs. Finally, this is an area in which the Court, as one who uses legal resources and hears and decides cases on a daily basis, has a special interest. Nevertheless, the Court must decide plaintiffs' claim in accordance with the law and the evidence produced at trial. I will discuss my factual findings, the legal standards I must consider, and finally my conclusions of law. Any legal conclusions I may make in my factual discussion shall be considered part of my conclusions of law.

Defendants' Law Library System

Defendants have chosen to meet their obligation to assist inmates "in the preparation and filing of meaningful legal papers" primarily by providing them with law libraries. They have contracted with Prison Legal Services of Michigan to provide some representation to inmates at the SPSM. Pls. exh. 108. Prison Legal Services cannot, however, represent inmates in civil rights actions against the Department of Corrections or its employees; it has insufficient staff to meet the demands of the inmates; and its services are available only to inmates confined at the SPSM. See T at 505-06. At each institution, therefore, defendants maintain a main law library that most of the general population inmates can use. Inmates in administrative segregation, punitive detention, and protective custody, and many minimum security inmates, do not, however, have direct physical access to these main law libraries. For these inmates, defendants attempt to satisfy their legal obligation by providing them with access to "mini-law libraries" and by allowing them to request books from the main law library. Since defendants have chosen to provide inmates with law libraries, I must evaluate their adequacy and must determine whether they provide inmates with meaningful access to the courts. Since each of the institutions has a different library structure, I will discuss them separately.

First, I consider the facilities available at the State Prison of Southern Michigan. Two complexes of this institution, the north complex and the south complex, are involved in this issue. Both complexes have their own law libraries that contain the required minimum collection. See pls. exh. 115. Each library, in addition, has access to the central complex law library, which contains many materials that are not on the required list. 3-19-87 T at 118; *see* defs. exh. 258 & 278a. Defendants inventory their holdings on a semi-annual basis

and regularly order and receive updated materials and replacements for materials that have been reported lost or damaged. See defs. exhs. 257, 257a, 253, 252a, 251b, 251c & 251d; pls. exh. 120 & 121; 3-19-87 T at 158-60; 3-23-87 T at 12-14. The inventories occasionally are disorganized and imprecise in identifying missing volumes. See pls. exh. 121. I find, however, that the north complex and south complex law librarians generally keep their collections up-to-date and in order. I also find, though, that there are certain materials not required by official policy, see PD-BCF-61.01, and which these libraries do not otherwise have in their collections, to which the inmates should have direct access: (1) a complete set of the Wright and Miller treatise on Federal Practice and Procedure, which the Court itself regularly uses (the libraries carry only volumes 1-3A of this treatise; although the central complex library carries the complete treatise, given its value to those pursuing federal court litigation, the north and south complex libraries also should carry it); (2) Michigan civil jury instructions (the law libraries carry only the criminal jury instructions); and (3) all of the local court rules for the state and federal courts (it appears that only the north complex library carries the federal local court rules).

The law libraries' physical facilities are cramped, particularly at the south complex, but adequate. See defs. exh. 327-28 & 331-34. The north complex law library is housed in the academic school, along with the general library, and seats 18-22 inmates (which includes general library inmates). 3-23-87 T at 7 & 24. The north complex has never turned any inmates away because of space limitations. *Id.* at 10. Books are available in the library on a call-out basis; the inmate requests a book from the inmate law clerk, who then retrieves it for him. An inmate can request up to three books at a time. By system-wide policy, each inmate is entitled to six hours of library time per week, in two-hour segments, plus extra time if

needed. In addition, the law libraries are supposed to be open a minimum of 25 hours per week, with at least one-half of those hours after 5:00 p.m. or on weekends. See pls. exh. 130; def. exh. 256 & 274. The north and south complex law libraries generally are open for the required number of hours, although there are times when they are closed, particularly in the north complex, due to staff absences. T at 950-51. The closures, however, although regrettable and a situation defendants certainly should rectify, are not sufficiently frequent to infringe on the inmates' right of access to the courts.

The south complex law library is housed in a trailer that can accommodate about nine inmates at a time. Although the available space is small, the librarian testified that he never has had to turn anyone away because of lack of space, 3-19-87 T at 152, and the evidence in the record does not establish that the small space is a significant problem. As with the north complex library, books are available to inmates by request and each inmate generally is limited to three books at a time. Inmate access to both libraries generally is on a call-out basis, pursuant to which an inmate submits a request to use the law library, and then is placed on a call-out sheet by the librarian or inmate law clerk and allowed to go to the library by the correctional officers for his housing unit. See defs. exh. 256 & 274. In the south complex, some inmates have a detail to the law library, pursuant to which they are allowed to go to the library at a scheduled time on a regular basis. The Court heard some evidence that inmates are not able to use the law library because its hours conflict with academic or work assignments, *e.g.*, T at 2542-43 & T at 951; that inmates are denied access to the law libraries; and that inmate law clerks, particularly in the north complex, deny access to inmates they do not like. These situations are not, however, sufficiently frequent or egregious to infringe on the inmates' right of access to the courts although I certainly condemn them. The

call-out system of library access is susceptible of, and occasionally subject to, abuse by staff and inmate law clerks. The evidence does not demonstrate, however, that it is being improperly implemented at the north and south complexes on a class-wide basis.

In terms of staffing, both libraries are headed by civilian law librarians. The south complex librarian has an associate's degree in library technology; the north complex librarian has a bachelor's degree, but no specialized training in librarianship. Both librarians have attended a two-day state sponsored workshop on legal research. They are not, however, allowed to assist inmates in legal research, other than to offer advice on where to look for guidance. See 3-19-87 T at 1661 3-23-87 T at 34 & 49; pls. exh. 142. I specfically find that the librarians are not qualified or competent to perform legal research, or even to offer inmates sound legal advice on where to research their specific problems. In particular, I heard no evidence from defendants indicating that their two-day legal research workshop is adequate training for the librarians, and I seriously doubt that it could be. The central complex librarian, who directly supervises the north and south complex librarians, does have a master's degree in library science from the University of Michigan and significant experience working in law libraries. There was no evidence, however, that she provides advice on inmate requests for legal assistance.

In addition to the civilian staff, the law libraries hire inmates to act as law clerks. They generally attempt to hire as clerks inmates who have shown an interest in, and some knowledge of, legal research. See 3-19-87 T at 113-14. They do not, however, have a formal training program for the inmate law clerks, and more importantly do not allow them to assist other inmates in their legal research. *E.g.*, 3-19-87 T at 167; pls. exh. 138. In general, the record more than adequately

demonstrates, for all of the institutions, that inmates usually must conduct legal research and draft complaints and other pleadings on their own. Inmates are not allowed to assist each other absent written authorization from prison officials or unless they are co-defendants. See pls. exhs. 113-P, 114, & 99. Few inmates use the written legal agreements for assistance, primarily because they are not always approved and because one of the inmates to the contract may be transferred to another institution, thereby effectively severing the relationship. *See, e.g.*, T at 534-35, 548-49, 557, 583, & 653-54; T at 981-82.

In addition, the often-fabled jailhouse lawyers or writ-writers are, at least in the Michigan system, too few and often too uninformed to provide adequate assistance to the inmates. T at 543-44; T at 1541-42 (jailhouse lawyer unavailable after complaint was filed; case later dismissed); T at 1603-12 (general difficulties with jailhouse lawyers; had to pay one $150.00); T at 1656-59 (had to pay inmate $25.00; inmate later transferred); T at 1692-93 (staff, but not the named defendants, discouraged inmate from assisting other inmates); T at 1162-68 (payment for services of jailhouse lawyers); T at 1770-75 (payment for services; also problems when "lawyer" transferred); T at 2118 (could not pay charge for jailhouse lawyer); T at 2398-99 (payment for services); T at 2440-41 (indicating demand for money for services); T at 2657-58 (law librarian forbade inmate assistance absent approved contract); & T at 3139 (inmate transferred before contract was approved). The payment of money for these services can, of course create serious conflicts among the inmate population, *cf.* T at 940, and defendants commendably attempt to regulate the situation by requiring an approvd written contract of assistance. As the Court already has found, however, inmates rarely use defendants' system and the system cannot assure assistance to inmates who require it. Indeed, defendants do not vigorously argue that inmates have adequate access to legal assistance from either other inmates or official staff.

I shift my focus now to the Michigan Reformatory. The MR offers inmates legal assistance in the form of a main law library and three "mini-law libraries." The so-called mini-law libraries are available to inmates confined in administrative segregation and protective custody, and inmates who are in transition from one housing unit or institution to another. It appears that one "mini-law library" has been closed, 3-23-87 T at 84 & 97-98, and that defendants currently have "mini-law libraries" only for inmates in administrative segregation (the Adjustment Center) and protective custody. The MR also has a dormitory unit, which houses minimum security inmates. By policy, inmates in this unit who wish to use a law library must request a temporary transfer to the SPSM. Pls. exh. 115. All other inmates at the MR have access to the main law library.

The main law library is housed in a building along with the general library. 3-23-87 T at 72; see defs. exh. 317. The space is adequate for the inmates' needs. Inmates generally have access to the law library on a call-out basis. 3-23-87 T at 87-89. As was the case with the SPSM libraries, the Court heard testimony indicating inmates occasionally are denied access to the law library, either because of improper actions by the inmate law clerks or because of staff error. In addition, the MR has had difficulty maintaining regular hours because it was without a head librarian for a while in 1986 and 1987. It recently hired a head librarian, however, who has a MLS degree in librarianship and experience working in prison law libraries. Defs. exh. 385 at ¶ 6. The Court heard no evidence, moreover, indicating that the inmates as a class had difficulty in getting access to the main law library or that inmates have been denied access to the courts because of this situation.

The main law library maintains the required legal materials as well as some supplemental materials. Like the SPSM law libraries, however, the MR library does not have a complete

set of the Wright and Miller treatise, the Michigan civil jury instructions, or the local rules for the federal district courts. In addition, the MR apparently carries an out-of-date treatise on habeas corpus law that was published in 1969. This is a glaring omission given the number of habeas writs filed in this Court. Defendants do not, moreover, conduct adequate inventories of the collection to ensure that it is kept up-to-date. See defs. exh. 284. The Court thus has no assurance that the MR collection is adequate for the inmates' needs.

The situation in the "mini-law libraries" is even worse. These "libraries," by policy, are required to carry only an extremely limited selection of materials. Pls. exh. 115. Although inmates can request books from the main law library, the "mini-law libraries" contain no digests and few treatises in which an inmate can locate cases to request from the main law library. In addition, defendants' exhibit 283 indicates that the I-Block mini-law library carries an out-of-date treatise on habeas corpus law and only a nutshell treatise on criminal law and procedure (although it does have the Gillespie treatise on Michigan criminal law and procedure). Even then, required materials often are missing from the libraries. T at 553-55; pls. exh. 161; 3-23-87 T at 84. Inmates confined in administrative segregation rarely, if ever, have direct access to assistance from other inmates or from staff. There also was some testimony that inmates are not always aware they can request books from the main law library and do not always receive what they have requested. See T at 2807; T at 1721. Even without these obstacles, inmates in these mini-law library units generally are allowed to request only five books at a time, three times a week, from the main law library. As I will discuss later in this opinion, this access is not adequate for a segregation inmate to be able to prepare a meaningful complaint.

Defendants staff the MR library with a head librarian and an assistant librarian. The head librarian has an advanced degree in librarianship and experience working in prison law libraries. The assistant librarian has a bachelor's degree in social work. Though they are qualified prison librarians, both persons, like the SPSM librarians, cannot provide much assistance to the inmates. In addition, the Court's findings on other sources of inmate assistance at the SPSM, particularly in terms of the inmate clerks and jailhouse lawyers, apply also to the Michigan Reformatory. I find in particular that inmates in the segregation unit, in protective custody, and in the transition unit generally do not have access to sources of legal assistance other than the "mini-law libraries," which, as I have found, are pathetically inadequate, and the main law library via book requests, which does not provide them an adequate opportunity to conduct meaningful legal research. Plaintiffs' exhibit 101 and Mr. Graves' testimony indicate that protective custody inmates are allowed direct access to the law library twice a week. Although this evidence contradicts defendants' policy directive, the Court finds that protective custody inmates are allowed limited access to the main law library for three hours per week. They still, however, primarily depend on the mini-law library and requests for books from the main law library for their research. See 3-23-87 T at 93.

The final institution to be analyzed is the Marquette Branch Prison. Like the MR, the MBP services its inmates through a main law library and a system of "mini-law libraries." The main law library is located in the general poulation section of the institution, in the academic school. It can accommodate approximately fifteen (15) inmates at a time and appears to be large enough to serve the general population inmates' needs. 3-24-87 at 115-16; *see* defs. exhs. 324-326. There are five "mini-law libraries," which are located in A-Block (protective custody), B-Block, D-Block, E-Block, and F-Block.

3-24-87 T at 132. As was the case at the MR, these mini-law libraries and whatever books the inmates can procure from the main law library provide segregation and protective custody imates with their only access to legal assistance. In addition, there are inmates confined at the trustee division, which is outside of the prison walls, who also are serviced through the main law library. The trustee division has a small collection of books, but it cannot really be called any kind of a library.

The main law library at the MBP contains all of the books required by policy, and the librarian at the institution inventories the collection twice a year to keep it up-to-date. See defs. exhs. 299a, 299b, & 299c. There is no indication in the record that this library contains much beyond the required collection, except for a prisoner self-help litigation manual. 3-24-87-T at 132. In addition, the library does not contain the materials the Court already has found should be added to the collections at the MR and the SPSM. *See supra* at 38-39. The mini-law libraries also contain the materials required by official policy, and the Court is satisfied that the librarian at the MBP keeps the mini-law library collections reasonably up-to-date. Plaintiffs' expert, Mr. Wilbur, testified that when he toured the "mini-libraries" in April, 1986 several items were missing from them. T at 564-66 & 572. In addition, several inmates testified as to missing materials. *E.g.*, T at 2256; T at 2112; & T at 2214. Defendants' librarian, Ms. Baker, testified, moreover, that she had had some difficulties with the "mini-law library" collections. 3-24-87 T at 131. She also testified, though, and defendants' exhibit 299c indicates, that the collections currently are in good shape. *Id.* at 133. The Court thus finds that defendants maintain the required materials at the "mini-law libraries."

The general population inmates generally have adequate access to the main law library. The library is open 27.5 hours

per week, defs. exh. 297a, and each inmate is allowed six hours of access per week, plus additional time if needed. *Id.* Although the Court is troubled by the lack of adequate night-time and weekend hours, which appears to violate defendants' official policy, pls. exh. 115 at 3; *see* pls. exh. 61, and even though there was testimony indicating inmates have been improperly denied additional law library time, see T at 1973-74, the Court does not find that inmates have been hindered in pursuing their cases because of the main law libraries' hours. As is the case at the MR, the head librarian at the MBP has a master's degree in library science, but does not assist inmates in their legal research. The inmate law clerks who assist the librarian also do not assist inmates in their legal research. 3-24-87 at 139-40. In addition, the Court adopts here its prior findings concerning inmate access to legal assistance from staff or other inmates.

In the segregation units, inmates are supposed to have access to the "mini-law libraries" for two hours per week. Unlike the general population inmates, the segregation inmates experience some difficulty in getting even this limited access. See T at 2596; T at 2255; T at 2051; & T at 1613-15. Inexplicably, inmates in one of the segregation blocks are even required to use the mini-law library during the middle of the night. T at 566-67; T at 1177 & 1199; & T at 1284. When the inmates do get access to a mini-law library, they often find it inadequate for their use. *E.g.*, T at 2596-97; T at 2255-56; & T at 1615. In addition, there was substantial testimony and documentation (see pls. exhs. 70, 91 & 102) indicating that inmates often are unable to get even the fifteen books a week they are allowed to receive from the main law library.

Defendants' exhibit 250A indicates that inmates in A-Block (formerly the MIPC) receive a number of books from the main

law library. Even assuming, however, that the main law library can and does fill 80% of the requests segregation inmates submit, see 3-24-87 T at 127, an inmate still will receive only an average of twelve books per week. As is the case with the MR mini-law libraries, moreover, the MBP mini-law libraries contain few, if any digests or treatises from which inmates can get case citations and thus know what case books to request from the main law library. It is impossible for them to conduct effective legal research under such a system, and the system is inadequate to provide them with effective access to the courts. *See infra* at 56. The situation is much the same in the trustee division, which has only a small law library and thus must depend on the main law library for most of its legal materials.

In summary, I find that the main law library at the MBP does not contain a sufficient number of the required materials to service properly the general population inmates, the segregation and protective custody inmates, and the inmates at the trustee division. The main law library simply has to serve too many different housing units for the collection it has. *Cf.*, pls. exh. 61. The situation is different than one where a number of inmates are using the same library. In the latter context, one copy of a book may suffice because any one inmate will have the book out for a maximum of two hours. If a book is sent to a segregation unit or to the trustee division, however, then it may be unavailable to other inmates for several days.

As the preceding factual discussion indicates, inmates at the subject facilities, particularly those who do not have direct access to the main law libraries, often are unable to conduct meaningful legal research or to gain assistance from persons who have some legal knowledge. I find that because of these barriers to legal research and deficiencies in defendants' law library system, inmates often are unable to file meaningful

complaints or to defend properly their complaints against motions to dismiss and motions for summary judgment. Some inmates are able to use the system to prepare effective complaints and to gain relief on their claims. See T at 966-67; T at 987-89 (with attorney assistance on the criminal cases); T at 1755 (responded to motions); T at 2816 (got misconduct setaside); & T at 3143 (recovered monetary award). A far greater number of inmates, however, are unable to use the system to gain meaningful access to judicial forums. See T at 1174-78 & 1247 (case dismissed; had trouble responding to motion); T at 1282-86 (unable to access books); T at 1541-45 & 1548 (unable to prepare effective response; made only one request for books); T at 1612-17 (could not respond to Magistrate's Report and Recommendation); T at 1658-62 (unable to respond to court orders); T at 1673-76 (delays in getting books; could not get two books at all); T at 1721 & 1725 (access delayed for ten months); T at 1767-69, 1776-77, 1787-88, 1819-20 (unable to respond to Report and Recommendation and to motion for summary judgment; suit is still pending); T at 1850 & 1851-5 (lost in library; had difficulty with administrative segregation library); T at 2211-14 (had difficulty with administrative segregation library); T at 2300-03 (unable to file delayed appeal); T at 2435-41 (could not use law library; did not know what to do); T at 2594-95, 2596-97, 2598, 2604-10 (although has filed suits and responded to motions, had difficulty in getting adequate access to materials); T at 2661-67 (could not file timely, effective response to Reports and Recommendations); T at 3014 (could not file meaningful habeas corpus petition; could not respond to state's submission).

I am aware that some inmates do not use their full efforts in pursuing their legal grievances. I also am aware that defendants, because of security and other concerns, may legitimately restrict certain inmates' access to the law libraries and other sources of legal assistance. For all inmates, and particularly

for inmates confined in the segregation units, inmates in protective custody, and certain minimum security inmates, however, the Court finds, as a factual matter, that defendants do not provide adequate access to legal materials or other sources of legal assistance, that defendants have not justified this denial of access, and that this denial of access has precluded inmates from filing meaningful legal papers and from effectively pursuing their legal remedies.

In addition to the adequacy of defendants' law libraries, including whether inmates who need assistance from other persons are able to get it, plaintiffs also challenge defendants' policies, procedures, and practices concerning photocopying of cases, complaints, and other legal documents; inmates' ability to call their attorneys; visits by attorneys to inmate clients; the care of inmates' legal materials during transfers; and inmates' access to notaries. In each of these areas, although inmates occasionally have difficulty and sometimes are hindered in their efforts to pursue legal remedies, I do not find, as a factual matter, that plaintiffs have established by a preponderance of the evidence that there is a need for judicial intervention.

Defendants' Constitutional Obligation

Any anlaysis of an access to courts issue must begin with the Supreme Court's decision in *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). In *Bounds* the Supreme Court was faced with the issue of "whether States must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge." *Id.* The Court, elaborating on its prior decisions in *Younger v. Gilmore*, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971) (*per curiam*), and *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), answered

that question affirmatively, holding that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498; *see Patterson v. Mintzes*, 717 F.2d 284, 288 (6th Cir.1983) (Prison officials are charged with the responsibility of assuring that inmate access to the courts is 'adequate, effective and meaningful' ") (citation omitted); *Holt v. Pitts*, 702 F.2d 639, 640 (6th Cir.1983) (a State must provide a prisoner with either a law library or "the assistance of legally-trained personnel"). State officials are given substantial discretion in deciding how to implement the holding of *Bounds*, and a court reviewing a State's system must evaluate it "as a whole to ascertain its compliance with constitutional standards." *Bounds*, 430 U.S. at 832, 97 S.Ct. at 1500. Whatever system a State chooses, however, must ensure that "inmate access to the courts is adequate, effective, and meaningful."

The vagueness of the Supreme Court's decision in *Bounds* has led lower federal courts to issue differing interpretations of what a State must do to ensure that inmates have meaningful access to the courts. Some courts have indicated that a State need only provide inmates with access to an adequate collection of law books, regardless of whether the inmates are able to use the materials. *See Campbell v. Miller*, 787 F.2d 217, 229-30 (7th Cir.1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 673; 93 L.Ed.2d 724 (1987); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir.1985); *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir.1984); *see also Hooks v. Wainwright*, 775 F.2d 1433, 1437-38 (11th Cir.1985) (inmates are not constitutionally entitled to an attorney if the State provides access to an adequate collection of law books), *cert. denied* ____ U.S. ____, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986). Other courts,

however, and in particular two district courts in this circuit, have found that a State may not always be able to satisfy its obligation under *Bounds* simply by providing inmates with access to a collection of law books. *See Kendrick v. Bland*, 586 F.Supp. 1536, 1549 (W.D.Ky.1984); *Glover v. Johnson*, 478 F.Supp. 1075, 1096 (E.D.Mich.1979); *see also Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 855 (9th Cir.1985) (indicating that an adequate law library under *Bounds* includes "inmate law clerks trained to assist inmates with legal problems"); *Battle v. Anderson*, 614 F.2d 251, 255-56 (10th Cir.1980) (indicating that an adequate supply of law books combined with access to writ writers and inmate law clerks may suffice under *Bounds*); *Cody v. Hillard*, 599 F.Supp. 1025, 1060-61 (D.S.D.1984) (following *Glover*), *aff'd*, 799 F.2d 447 (8th Cir.1986), *reh'g granted*, Oct. 28, 1986. In a follow-up on the Supreme Court's decision in *Bounds* itself, moreover, the Court of Appeals for the Fourth Circuit recently upheld a district court's finding that the State of North Carolina had failed to provide an adequate law library for inmates because, in part, it had not implemented a program for "the training and placement of . . . inmate paralegals." *Smith v. Bounds*, 813 F.2d 1299, 1302 (4th Cir.1987).

[10] From its analysis of the published case law the Court has concluded that a State seeking to satisfy its obligation under *Bounds* generally must provide a program of access that satisfies two criteria. First, the program must provide some source of legal information, whether in the form of an adequately stocked law library, attorneys, or some combination of the two, to all inmates. Secondly, "for those inmates who possess insufficient intellectual or educational abilities to permit reasonable comprehension of their legal claims, provision must be made to allow them to communicate with someone who, after consultation with the legal learning source, is capable of translating their complaints into an understandable presenta-

tion." *Kendrick*, 586 F.Supp. at 1549; *see Glover*, 478 F.Supp. at 1096. This analysis is consistent with the Supreme Court's opinion in *Bounds*, in which the Court indicated a state may be required to provide some additional assistance to inmates who are unable to perform legal research on their own. *Bounds*, 430 U.S. at 823-24 & 826, 97 S.Ct. at 1495-96, 1497; *see also Wolff*, 418 U.S. at 577-80, 94 S.Ct. at 2985-86 (holding that States must allow inmates to assist each other in civil rights and habeas actions.)

It is not inconsistent, moreover, with the Sixth Circuit's admonitions that a State is required only to provide either an adequate law library or trained legal assistance. *See Penland v. Warren County Jail*, 759 F.2d 524, 531-32 & 531 n. 7 (6th Cir.1985) (*en banc*). A State that provides an inmate with access to an adequate law library is not obligated to provide that inmate with a professionally trained assistant to conduct his legal research, draft his complaint, and try his case. *See Hooks*, 775 F.2d at 1437-38. Simply holding that an inmate is not entitled to both an adequate law library and access to an attorney does not, however, resolve the issue of whether a State must provide at least a minimal amount of assistance — for example, inmate law clerks or paralegals who can assist an inmate in his research and explain to him how to file a competent complaint or how to respond to a motion to dismiss or a motion for summary judgment — to inmates who because of illiteracy or similar intellectual or educational handicaps simply cannot use a law library without assistance. The Court believes that a fair reading of *Bounds* demonstrates that the Supreme Court expected that States would provide such assistance to inmates who need it: the assistance, if needed, would be on component of an adequate law library.

Nevertheless, in deciding an access to courts claim a court must evaluate the State's system as a whole. If inmates have

adequate access to the courts under the State's system, then the system, or plan, is not unconstitutional simply because it does not satisfy the two criteria stated above. As the Sixth Circuit has held, "[w]e are concerned with a right of access *to the courts*, not necessarily to a prison law library." *Walker*, 771 F.2d at 932 (emphasis in original). Inmates are not entitled to "some minimum amount of time in the prison law library"; they bear the initial burden, rather, of demonstrating that the State's system has impeded their access to the courts. *Id.; see also Childs v. Pellegrin*, 822 F.2d 1382, 1384-85 (6th Cir.1987) (sufficient access was provided where the inmate appeared before the trial court, which questioned him carefully about his claim); *Hossman v. Spradlin*, 812 F.2d 1019, 1021 (7th Cir.1987) (States are required to provide inmates "that quantum of access to prison libraries — not total or unlimited access — which will enable them to research the law and determine what facts may be necessary to state a cause of action"); *Cepulonis*, 732 F.2d at 3 & 5 (access is denied if inmates have inadequate time to conduct legal research).

[11] Once the inmates have established a *prima facie* case that they have been denied access to the courts, however, the burden shifts to the State to establish that its system or plan of access is constitutionally adequate under *Bounds*. *Smith*, 813 F.2d at 1302; *Campbell*, 787 F.2d at 225-26; *Rich v. Zitnay*, 644 F.2d 41, 43 (1st Cir.1981). Some courts have indicated that plaintiffs can establish a *prima facie* case simply by demonstrating that they have inadequate access to a law library. *See Cepulonis*, 732 F.2d at 4; *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1403 & 1413 (N.D.Cal. 984), *aff'd in relevant part*, 801 F.2d 1080 (9th Cir.1986); *Green v. Ferrell*, 801 F.2d 765, 772-73 (5th Cir.1986). Finally, in analyzing defendants' system the Court must consider that under *Bounds* a State is obligated only to assist inmates in "the preparation and filing of meaningful legal papers," *i.e.*, nonfrivolous com-

plaints and petitions that meet all procedural requisites and adequate responses to motions to dismiss and motions for summary judgment. *Bounds*, 430 U.S. at 826 & 828, 97 S.Ct. at 1497, 1498. A State is not obligated to do anything more than assist inmates at the pleading stage. *Nordgren v. Milliken*, 762 F.2d 851, 854-55 (10th Cir.1985), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985); *see Mann v. Smith*, 796 F.2d 79, 84-85 (5th Cir.1986).

The Constitutional Adequacy of Defendants' System

The first issue the Court must decide in evaluating the adequacy of defendants' system is whether plaintiffs have met their initial, *prima facie*, burden of establishing that the system is inadequate in any respect. In accordance with its factual findings, the Court finds that they have. The Court concludes, and holds, that defendants' present system denies inmates appropriate, *i.e.*, adequate, effective, and meaningful, access to the courts. Defendants' statistics, see defs. exhs. 304, 383, & 387, demonstrate that the plaintiffs, as a class, have access to the courts in the sense that they are able to file complaints and petitions for relief. The Supreme Court emphasized in *Bounds*, however, that States must assist inmates in the preparation and filing of nonfrivolous claims that meet all procedural prerequisites, and in preparing responses to the State's arguments. *Bounds*, 430 U.S. at 826, 97 S.Ct. at 1497. Defendants' statistics do not demonstrate that inmates have adequate, effective, and meaningful access to the courts. A complaint or petition is not meaningful or adequate if it cannot survive a motion to dismiss on procedural grounds, *e.g.*, failure to exhaust state court remedies, lack of jurisdiction, or failure to name the proper parties, or if it fails to state a proper claim for relief.

An inmate also is denied meaningful access to the courts if he is unable to respond to a Magistrate's Report and Recom-

mendation, or if he is unable to meet a court-established deadline for filing an amended complaint, or if he does not know he may be able to convince a court to reconsider a decision made because he had missed a deadline, simply because he is unable to gain access to a library or to use legal materials. As a district court judge who has reviewed and decided numerous prisoner complaints and petitions, I know that many inmates do not respond to Reports and Recommendations and court orders. Because of the evidence I considered in this case, I have a deeper appreciation of the difficulties inmates face in filing a meaningful complaint and in defending the validity of that complaint. More importantly, as I already have found, defendants' present plan for meeting their obligation under *Bounds* is inadequate, and because of the plan's inadequacies inmates are being denied their constitutional right of access to the courts.

[12] The inadequacies of defendants' plan vary somewhat depending on the inmate population group. The general population inmates, who have direct personal access to the main law libraries, must deal with four inadequacies in defendants' system. First, the main law libraries do not contain certain materials that an inmate needs to file a meaningful complaint. Specifically, all of the main law libraries should contain a complete set of the Wright and Miller treatise on Federal Practice and Procedure; a set of Michigan civil jury instructions; the local court rules for the state courts (if they have any) and for the federal courts; and an up-to-date habeas corpus treatise. Secondly, at the Michigan Reformatory defendants should conduct regular and effective inventories of the law libraries. I find that the present inventories are inadequate to ensure that all of the required books are available to the inmates, and that the inventory in the record indicates that significant portions of the collection are missing. Thirdly, the MBP main law library must expand the amount of duplicate

materials it carries so that it can service the inmates properly. I conclude, as a matter of law, that inmates have been denied meaningful access to the courts at the MBP because they have been unable to secure necessary law books. Fourthly, and finally, defendants are denying inmates their constitutional right of access to the courts by failing to provide assistance to those general population inmates who are unable to use the law libraries effectively. As I have found, inmates cannot secure meaningful assistance from either staff or other inmates. I reiterate that I am not requiring defendants to provide trained attorneys to assist inmates who have access to an adequate collection of law books. They are required, however, to provide some kind of research and other preliminary assistance to inmates who need it.

The situation of inmates who are confined to administrative segregation, protective custody, and certain minimum security areas, and consequently have little or no direct access to the main law libraries, is even more critical.[1] Defendants attempt to satisfy their obligation under *Bounds* by providing these inmates with access to "mini-law libraries" and the opportunity to request books from the main law libraries. I already have found, as a factual matter that this system is inadequate, and now hold, in agreement with several other courts, that this system is unconstitutional as well. *See Toussaint*, 801 F.2d at 1109-1110; *Green*, 801 F.2d at 772; *Williams v. Lane*, 646 F.Supp. 1379, 1389 & 1407 (N.D.Ill.1986); *Canterino v. Wilson*, 562 F.Supp. 106, 110 (W.D.Ky.1983). Defendants may well have legitimate security reasons for not allowing

[1]Also critical is the situation of those inmates who receive reports and recommendations or motions while they are in transit between institutions. They have absolutely no access to a law library or any other source of legal information for assistance in preparing an effective response. In addition, many inmates either lose their personal legal materials during these transitions or have to wait a considerable period of time before regaining possession of them.

these inmates access to the main law libraries, although they produced no evidence of such reasons at trial, and an inmate is not entitled to unrestricted access to the law library on his own terms. *See Grossman*, 812 F.2d at 1021; *Campbell, 787 F.2d at 227-29. Defendants, however, still must satisfy their obligation under Bounds*. If they do not wish to provide adequate law libraries for these inmates, *i.e.*, access to an adequate collection of law books and minimal legal assistance to those inmates who need it, they must provide them with access to legally trained personnel.*See Toussaint*, 801 F.2d at 1109-10; *Cepulonis*, 732 F.2d at 4-5; *Holt*, 702 F.2d at 640. I hold that by failing to provide these inmates with access either to an adequate law library or to adequately trained legal assistance, defendants are violating the requirements of *Bounds* and plaintiffs' right of access to the courts. I further hold that even absent any proof of harm to these inmates (I find, however, that there is harm), defendants' system on its face is constitutionally inadequate. No person, not even a trained attorney, can prepare an effective complaint without adequate access to law books.

In accordance with the above discussion, the Court will require defendants to prepare a plan to remedy the defects in their current law library system. This plan shall address the following issues: (1) supplementing the main law library collections; (2) ensuring that the MR conducts regular and effective inventories of its law library collections; (3) providing some research and explanatory assistance to inmates who use the main law libraries; and (4) providing either direct access to legal assistance or direct access to adequate law libraries, including access to both law books and assistance for inmates who require it, for inmates who presently do not have direct access to the main law libraries. Defendants shall have sixty (60) days from the date of this opinion to submit their plan. Plaintiffs then shall have thirty (30) days to respond to the

plan. The Court thereafter will enter a final injunctive order requiring defendants to implement an appropriate remedial plan. It would greatly assist the Court, of course, and would facilitate the entry of a final order, if the parties could agree on an appropriate remedial order.

V. *Plaintiffs' Racial Discrimination Claim*

Plaintiffs' final claim is that defendants are discriminating against black inmates on the basis of their race. This claim is contained in one paragraph of plaintiffs' first amended complaint.

> 55. Although a majority of the inmates are black, disproportionately few staff members are black. Certain desireable inmates jobs are disproportionately assigned to white inmates. Cafeteria serving lines are generally segregated by race. Black inmates are assigned to punitive segregation in disproportionate numbers; white inmates are assigned to protective custody in disproportionate numbers. Certain white staff display attitudes of racially motivated hostility to black inmates. Racial tension contributes to the atmosphere of violence at the prisons.

First Amended Complaint ¶ 55. At trial, plaintiffs introduced evidence suggesting that white inmates are disproportionately assigned to protective custody; that black inmates are disproportionately assigned to administrative segregation and punitive detention or segregation; that some correctional officers subject black inmates to racial harassment in the form of racial slurs and other kinds of racially oriented misconduct; that the subject institutions' dining halls are racially segregated; and that black inmates are discriminated against in the employment process. I first will analyze the legal standards I must apply in deciding plaintiffs' claims. I then will discuss and decide

each claim separately. In deciding these claims, I have considered not only the parties' post-trial submissions, but also the materials they submitted on defendants' Rule 41(b) motion and plaintiffs' supplemental pretrial brief on this issue. Before addressing the merits of plaintiffs' claims, however, I will resolve three evidentiary disputes and will decide defendants' renewed motion to decertify the class on this claim.

The first evidentiary matter to resolve is defendants' May 7, 1987 motion to strike the testimony of Dr. Ronald Christensen, plaintiffs' statistics expert, which was given on June 3rd, 4th and 5th, 1986. The impetus for defendants' motion was the Court's decision to exclude part of the testimony of their racial discrimination expert, Camille Camp, because they had not provided plaintiffs with sufficient notice of the statistical data underlying Ms. Camp's proposed testimony. See 4-24-87 T at 45-69. They advance two grounds in support of their motion. First, they argue that the Court erred in striking Ms. Camp's testimony and that "it is manifest and unfair to apply the rigorous standards to exclude the important testimony of Defendants' experts while allowing the testimony of Plaintiffs' expert to stand." Motion to strike at 4-5. Secondly, defendants argue that plaintiffs similarly did not give them advance notice of the statistical data underlying Dr. Christensen's testimony. *See* Affidavit of David G. Edick: Plaintiffs urge the Court to deny defendants' motion, arguing that with two minor exceptions they complied fully with the Court's pretrial order and order scheduling events in supplying defendants with Dr. Christensen's data and that defendants could have recalled Dr. Christensen for further cross-examination.

[13] I will deny defendants' motion for two reasons. First, I reject defendants' attempt to reargue the merits of my ruling on Ms. Camp. Defendants cited none of the cases they

discuss in their motion when they asked me on April 27th to reconsider my decision, despite having had the weekend to research the issue. 4-27-87 T at 235-36. It is too late now for defendants again to ask me to reconsider my ruling. Secondly, the situations regarding Dr. Christensen and Ms. Camp are dissimilar in two significant respects. In the first place, with some minor exceptions, it appears that plaintiffs complied with the order scheduling events and the pretrial order in supplying Dr. Christensen's data to the defendants. In the second place, I indicated at trial that defendants could request permission to recall Dr. Christensen for further cross-examination if they needed additional preparation time. T at 122-24 & 297. I do not believe defendants ever requested permission to cross-examine Dr. Christensen further. The Court's indications, if any, that defendants could respond to Dr. Christensen's testimony with rebuttal evidence rather than cross-examination did not, of course, excuse them from complying with the Court's orders and a fundamental standard of fairness in presenting their testimony. The Court appreciates the significance of Ms. Camp's proposed testimony. I see no reason, however, either to reconsider my decision on that testimony or to strike Dr. Christensen's testimony, and therefore deny defendants' motion.

The second evidentiary dispute concerns Mr. Chapman's testimony. At the Court's request, the parties videotaped Mr. Chapman's testimony on November 6, 1986 in Washington, D.C. I have reviewed portions of the videotape and the entire transcript of Mr. Chapman's testimony. I have ruled on the objections made during his testimony and on the exhibits plaintiffs sought to introduce through him. Those rulings can be found in footnote two to this opinion.[2]

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[2]The court makes the following rulings on the evidentiary objections made during Mr. Chapman's testimony. The objections are listed by page number: 23 — overruled; 24-25 — overruled; 26 — overruled; 28 — over-

The third evidentiary matter concerns whether the Court should grant preclusive effect to the results of major miscon-

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ruled; 30-31 — overruled; 31-34 — overruled; 37-38 — overruled; 38 — overruled; 39 — overruled; 40 — overruled; 41 — sustained; 56 — overruled; 59-60 — overruled; 60-62 — overruled; 66 — overruled as being moot; 72-73 — overruled; 77 — overruled; 78-82 — overruled, but the answer on page 82 is limited to the obvious, *i.e.*, that defendants' rejection of racial slur grievances tends to discourage inmates from filing such grievances; the evidence does not suggest that this situation exacerbates the treatment of black inmates; defendants' motion to strike the answer is denied; 86 — sustained; the answer is not tied to evidence of racial motivation; it could be admissible it it were linked up; 87 — sustained; there is no evidence that racially motivated correctional officers issued the tickets; 92 — sustained; there is no evidence that Meyers, Bills, and Pringle knew each other; there is no foundation for the perception of unequal treatment; 95-96 — sustained; the answer assumes that Sullivan's statement and reason for wanting to be in detention are true; 116-18 — overruled; the objection is untimely and the opinion is within the expert's knowledge based on statistics, interviews, tours, and evidence presented to him; 130-31 — overruled; questions regarding background and prejudices are proper; 131 — overruled; 133 — sustained; irrelevant; 134 — sustained; irrelevant; 136 — overruled; 142-43 — sustained; the question on religious beliefs is improper; 145-46 — sustained unless it is established that the quotation came from Myrdal; 150-51 — sustained; the witness cannot opine about a study he does not know about; 151-54 — sustained for the same reason; 154 — overruled; 156-57 — overruled; 158-59 — sustained; the Court is not interested on the witness' "surprise"; 160-61 — overruled; the witness is familiar with the study; 168 — sustained; compound question; 171 — overruled; untimely; 171-74 — moot; the question was not answered; 176 — overruled; 177 — overruled; 180 — overruled; 181 — overruled; 188 — overruled; 189 — sustained; the exhibit is not in evidence; 190 — sustained for the same reason; 192-93 — sustained for the same reason; 195-98 — most of the question was not answered; the objection is sustained because the document is not in evidence and was not on defendants' exhibit list; 210 — overruled; 214 — overruled.

In addition to these rulings, the Court will allow in the following exhibits; (1) exhibit 421 is admitted as evidence on which a race relations expert can rely. The staff response to the racial complaint can assist the expert in evaluating staff responses to inmate racial complaints. The Court will ignore the sex discrimination aspect of the complaint. The exhibit is admitted to give the witness another source of information for his opinion

conduct and administrative segregation hearings within the Michigan prison system. In other words, defendants argue that because these hearings are quasi-judicial in nature, plaintiffs cannot now argue that they are infected with racial discrimination and cannot challenge the results of the hearings on that basis. *See University of Tennessee v. Elliot*, ____ U.S. ____, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). Plaintiffs disagree, and request the Court to rule that they "are not precluded from presenting evidence that the results of disciplinary or reclassification hearings are the product of racial discrimination." Plaintiffs' Memorandum at 7.

The Court declines to decide this issue for two reasons. First, I do not believe plaintiffs are challenging the major misconduct or administrative segregation (reclassification) hearings themselves as being racially motivated. Their argument, rather, is that due to racial discrimination black inmates receive a disproportionate number of major misconduct tickets and hence are disproportionately assigned to punitive detention and administrative segregation. I disagree in particular with defendants' statement that "all grievances which were precipitated by the receipt of a major misconduct ticket . . . amount to a collateral attack on the major misconduct hearing report." Defendant's Brief at 7. That the inmate may properly have been found guilty of the charge does not address the issue of whether the ticketing officer was racially motivated.

Secondly, the evidence suggests that racial discrimination is not a defense to a major misconduct ticket or a proper issue to be raised in a reclassification hearing. To the extent, then, that plaintiffs are challenging the outcomes of the major miscon-

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on whether racial grievances are useless. It is not admitted as substantive evidence of discrimination. (2) 477e and 477f are admitted over defendants' objections. (3) 576 and 793 are admitted.

duct and administrative segregation hearings, they are entitled to do so because defendants have not established that the issue of racial discrimination can be raised and decided in those hearings, and thus have not properly raised the issue of whether the Court should give the hearings' outcomes preclusive effect. For the above reasons, the Court finds that it need not decide whether it should grant preclusive effect to the outcomes of defendants' major misconduct and administrative segregation hearings.

[14] During trial, defendants again requested the Court to decertify the plaintiff class on the issue of racial discrimination. T at 480-81. The Court reserved ruling on defendants' motion until the end of trial. *Id.* at 528-29. The parties have filed post-trial briefs on defendants' motion, which the Court repeatedly has denied in the past because defendants could not establish that there exists an intra-class conflict or genuine antagonism between the white inmates and the black inmates such that plaintiffs' attorneys cannot adequately represent the entire class on the racial discrimination issue. See Opinion of July 15, 1986; Opinion of August 29, 1985. The Court has reviewed the parties' submissions, the evidence in the record, and the relevant cases. To the extent that defendants are requesting the Court to decertify the plaintiff class on the claims discussed in plaintiffs' May 27, 1986 Pre-Trial Brief, *i.e.*, that due to intentional racial discrimination "the large majority of prisoners in administrative and punitive segregation are Black, while the large majority of those in protective custody are Caucasian" and "the highest job levels and most desirable jobs are filled disproportionately by Caucasian prisoners, while the majority of Black prisoners are relegated to less prestigious jobs," the Court denies their motion. On these issues, I adhere to my earlier ruling that plaintiffs can adequately represent the interests of both black inmates and white inmates because "if Defendants' practices and policies are racially discrimina-

tory, both black and white inmates are the victims of the resultant racial tensions in the prisons" and "have a common interest in alleviating these conditions." Opinion of Aug. 29, 1985 at 6.

The Court in particular finds defendants' arguments regarding protective custody, administrative segregation, and punitive detention to be specious. Plaintiffs never have suggested that defendants should maintain a racial balance in any of these housing areas; they merely argue that defendants should cease their alleged practice of assigning inmates to these areas on the basis of their race. With regard to plaintiffs' employment discrimination claim, as defined above, there is no evidence in the record indicating that to grant relief on this claim would impair any legitimate interests of the white inmates. *See Social Serivces Union v. County of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979). The issue is a close one. Given that the named plaintiffs consist of both black inmates and white inmates, and given the particularly damaging effects of racial discrimination in a closed prison environment, however, the Court will adhere to its prior decisions on this issue.

Shortly before the start of trial, though, plaintiffs altered their racial discrimination in employment claim. For the first time, they argued that defendants' "anti-discrimination" policy, PD-DWA-64.01, is unconstitutional because it sets a ceiling on minority employment. See Response to Defendants' First Motion in Limine at 9. Although the trial transcript may not reflect my feelings, I was bemused by the seeming discrepancy between plaintiffs' pre-trial brief and their response to defendants' first motion in limine. Plaintiffs did not attack defendants' policy in their pre-trial brief, arguing instead that "racially stereotypic attitudes on the part of a majority Caucasian staff have led to disproportionate overrepresentation of Black prisoners . . . in lower levels of jobs

and the least desirable jobs." Pre-Trial Brief at 8. Nor did they attack it in their May 15, 1986 Proposed Findings of Fact and Conclusions of Law. In a supplemental brief filed during the trial, however, plaintiffs argued that defendants' policy "requires job discrimination against Black job applicants whenever Blacks already comprise an arbitrarily determined percentage of existing employment in a particular job category," Supplemental Brief on the Issue of Racial Discrimination at 1. They endorsed the policy, though, "insofar as it sets a floor for Black employment," believing that such a floor "is mandated based on defendants' past history of discrimination" against black inmates. *Id.* at 8.

[15] I allowed plaintiffs to proceed with this claim because, as I already have indicated, I was not sure where plaintiffs were going and defendants did not claim they were unduly prejudiced in having to defend against it. Plaintiffs' post-trial brief clearly demonstrates, however, that the Court cannot allow the class to continue on the issue of the validity of defendants' "antidiscrimination" policy. In their brief, plaintiffs reiterate their argument that the policy places a ceiling on black employment, and contend that while past discrimination against black inmates justifies continuation of the policy as a floor on black employment, *i.e.*, as an affirmative action tool, it should not be used as a means of limiting black employment in any particular job category. They ask the Court to modify "defendants' current anti-discrimination policy to provide that the plus or minus 10% of Black prisoners representation in the population be a goal, not a ceiling, for all job assignments. After the defendants reach that goal for the entire system, race should not be a factor in job assignments; rather the assignments thereafter should be made solely on the basis of qualification at the time of making application." Plaintiffs' May 15, 1987 Trial Brief at 25. Plaintiffs argue in support of their position that "Black prisoners testified they were denied jobs

because these jobs had been reserved for Caucasian prisoners''; that the policy is an affirmative action program; that evidence of defendants' past and present discrimination against black inmates ''supports the develoment of the policy to protect the rights of Black prisoners'' and ''the continuation of a race conscious policy for the assignment of Black prisoners to jobs''; that ''[t]he record contains no evidence of a like history of discrimination against Causcasian prisoners''; and that the policy ''improperly serves as a race-conscious program to benefit Caucasian prisoners.'' *Id.* at 1-3.

It is clear from plaintiffs' arguments and the evidence they inroduced at trial that on this issue the interests of the black inmates and the white inmates diverge. There is no evidence in the record to counter plaintiffs' request that the Court continue the policy as a floor on black inmate employment because neither of the parties had any reason to present such evidence. Like the plaintiffs, defendants want to continue the policy. See 4-27-87 T at 170-71. No one at trial argued that the policy also should be maintained as a floor on the employment of white inmates who also may be denied employment because of the policy, or that the policy should not be continued as a floor on black inmate employment. Once plaintiffs brought defendants' policy into the case and began arguing that it should be continued as a floor on black inmate employment, the interests of the black inmates and the white inmates diverged. I do not believe plaintiffs' counsel can adequately represent the interests of the entire class on this specific issue and I find that the potential intra-class conflicts are too significant to allow the class to remain certified on it. *See Droughn v. FMC Corp.*, 74 F.R.D. 639, 643 (E.D.Pa. 1977). The Court accordingly grants defendants' motion in part and decertifies the plaintiff class to the extent that plaintiffs challenge defendants' anti-discrimination policy. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740

(1982) I regret having to take this action. Given the clear intra-class conflict posed by plaintiffs' challenge to the policy, however, I have no choice. I will consider plaintiffs' employment discrimination claim on the issues raised in their pre-trial brief.

[16] Turning now to the merits of plaintiffs' claim, State prison officials, like all other government officers, are subject to the Fourteenth Amendment's prohibition of intentional or purposeful racial discrimination, except possibly for " 'the necessities of prison security and discipline.' " *Cruz v. Beto*, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (*per curiam*) (*quoting Lee v. Washington*, 390 U.S. 333, 334, 88 S.Ct. 994, 995, 19 L.Ed.2d 1212 (1968) (Black, J., concurring)). They cannot discriminate on the basis of race in inmate housing, *McClelland v. Sigler*, 456 F.2d 1266, 1267 (8th Cir.1972); *United States v. Wyandotte County*, 480 F.2d 969, 970 (10th Cir.), *cert. denied*, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973); in inmate discipline, *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 209-10 (8th Cir. 1974); *McCray v. Bennett*, 467 F.Supp. 187, 195-96 (M.D.Ala.1978), or in inmate employment. *Gates v. Collier*, 349 F.Supp. 881, 887 & 901 (N.D.Miss.1972), *aff'd*, 501 F.2d 1291 (5th Cir.1974); *Battle v. Anderson*, 376 F.Supp. 402, 410-11 & 421 (E.D.Okla.1974). Prison officials cannot, moreover, justify racial discrimination by reference to vague fears of inmate violence if racial segregation is not continued. *Wyandotte County*, 480 F.2d at 971-72; *Mickens v. Winston*, 462 F.Supp. 910, 911-12 (E.D.Va.1978), *aff'd mem.*, 609 F.2d 508 (4th Cir.1979). They have an affirmative duty, rather, "to remedy unlawful practices." *Blevins v. Brew*, 593 F.Supp. 245, 248 (W.D.Wisc.1984). If inmates can establish that "discriminatory purpose [is] a movitating factor" in any of the decisions made by prison officials, then the officials must prove "that the same decision would have resulted even had the

impermissible purpose not been considered." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 & n. 21, 97 S.Ct. 555, 556 n. 21, 50 L.Ed.2d 450 (1977). With these standards in mind, I turn to plaintiffs' claims.

I begin by addressing plaintiffs' claim that white inmates are disproportionately assigned to protective custody and that black inmates are unable to get into protective custody. Plaintiffs presented two kinds of evidence in support of this claim. First, they presented statistical evidence, which was statistically significant, demonstrating that although blacks constitute a majority of the inmate population in the subject institutions, a majority or other disproportionate percentage of the inmates in protective custody are white. T at 277-79; pls. exhs. 510-D, 510-F, 510-H, & 521-M; *see* pls. exhs. 47 at 11 & 48 at 20. Secondly, they presented evidence suggesting that the MR staff person responsible for assigning inmates to protective custody may have a stereotypic view of black inmates, believing them to be streetwise and violence prone and hence not in need of protective custody, T at 35-36 & 112-13; that a couple of inmates may have received racially disparate treatment regarding assignment to protective custody, T at 3084-85; T at 3073 & 3086; T at 1364-67; pls. exhs. 460-C, 460-L, & 648-A; T at 2315-16; and that one black who did get into protective custody at the MR was subsequently subject to racially discriminatory treatment that led him to request reassignment to the general population. T at 3070-73.

[17] The Court finds that black inmates are not intentionally discriminated against on a class-wide basis in terms of placement in protective custody, and will deny plantiffs' claim for relief on that ground, for several reasons. Plaintiffs' statistical evidence does not, by itself, support a finding that defendants intentionally discriminate against black inmates in this

area. Although the statistical disparities are significant, they are not the kind of "clear pattern, unexplainable on grounds other than race," that would support an equal protection claim. *See Village of Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564. Plaintiffs failed to provide sufficient supporting evidence to establish that the statistical disparities are the product of intentional racial discrimination against black inmates. A few, unrebutted, incidents of apparent discrimination, spread over the approximately four-year time frame of this lawsuit, simply do not provide a sufficient basis for this Court to infer a racially discriminatory intent and to impose class-wide liability on the defendants. This is true even though all of the incidents occurred at the MR and even if I accept plaintiffs' assessment of Deputy Adams' attitude toward black inmates. Plaintiffs, moreover, produced evidence of only one black inmate who had requested, but been denied, placement in protective custody. T at 1366-67. Although this incident, and the other incidents of apparent racially discriminatory treatment to which inmates testified at trial, was regrettable, it does not justify granting plaintiffs the class-wide relief they seek. Finally, the Court found credible defendants' testimony that their official policy is that all inmates are put in protective custody up on request. 3-16-87 T at 86-87.

Plaintiffs' next claim is that black inmates are discriminatorily assigned to administrative segregation and punitive detention/segregation. Again, they seek to support their claim with a combination of statistical data indicating there is a statistically significant disproportionate number of black inmates in administrative segregation and punitive detention, and testimonial and documentary evidence suggesting that this disproportionality is the result of intentional racially discriminatory treatment of black inmates. With regard to the latter prong of their proof, plaintiffs request the Court to conclude that black inmates live in a racially tense atmosphere punctuated by racial

disturbances, racial slurs and other racially demeaning behavior by white staff members that provoke black inmates, and disparate ticketing of white and black inmates for violating institutional rules. They also request the Court to find that approximately fifty (50%) percent of the placements in administrative segregation are triggered by tickets for non-assaultive offenses; that non-assaultive offenses are subjective, and thus subject to the whims and prejudices of individual correctional officers; that black inmates receive a disproportionate number of non-assaultive misconduct tickets, in particular tickets for insolence; and that the overwhelmingly white correctional staff, particularly at the MBP, hold racially stereotypic views of black inmates — which they are in part taught at the new employee training school — that lead them to treat black inmates differently than white inmates in the disciplinary process.

Plaintiffs' claim and evidence presents a difficult issue for the Court to decide. Their statistical evidence, which defendants for the most part did not rebut, evinces a disturbing pattern of disproportionate assignments of black inmates to punitive detention, and frequently subsequently to administrative segregation. Under Michigan's disciplinary system, a correctional officer can ticket an inmate for violating institutional rules. The tickets can be either for major misconduct or for minor misconduct. See pls. exh. 404-A at 2-2h. If the ticket be for major misconduct, the inmate faces some rather severe penalties and is entitled to a hearing before a hearing officer, who is an attorney not subject to the direct control of correctional officials. See M.C.L. 791.251-.252; 3-16-87 T at 88. The hearing officer determines whether the inmate is guilty of the charged offense and determines the punishment if he finds the inmate guilty. See M.C.L. 791.252(k); defs. exh. 101.

A major misconduct charge, moreover, may lead to the inmate being placed in administrative segregation. Inmates are placed in administrative segregation if a prison security classification committee determines that "they cannot be managed with general group privileges because they need protection, are escape risks or their behavior is a serious threat to property, themselves, staff, fellow prisoners or the safety and security of the facility." *Id.* This reclassification process apparently is outlined in two administrative rules, rule 791.4405 and rule 791.3315, see defs. exh. 42, which the parties, for whatever reason, failed to introduce into evidence. Even without the benefit of these rules, however, the Court can find that inmates who receive major misconduct tickets face placement in punitive segregation, pursuant to a finding of guilt and a determination of punishment by the hearing officer, and reclassification to administrative segregation, pursuant to a determination by the security classification committee.

I also find that plaintiffs do not allege that the hearing officers themselves are racially motivated, and I specifically find that there is no evidence in the record to support such a contention. See Chapman T. at 202. I further find that with the possible exception of one or two persons, plaintiffs do not allege that the security classification committees are racially biased toward black inmates, and I specifically find there is insufficient evidence to conclude that the committees intentionally discriminate against black inmates in placing inmates in administrative segregation. At best, plaintiffs have suggested that the Deputy Warden at the MR may harbor a stereotypic view about black inmates that may affect his decisions on whether to assign inmates to administrative segregation. Even then, plaintiffs have not established that he has ever intentionally discriminated against a black inmate in placing him in administrtaive segregation. *Cf.* T at 271; pls. exh. 510-G (disproportionate number of black inmates in administrative

segregation at the MR is not statistically significant). Moreover, even were I to accept plaintiffs' view that actions taken pursuant to "preconceived ideas and often unconscious prejudices" can constitute intentional discrimination, *see Finney*, 505 F.2d at 209; *see generally* Lawrence, *The Id:, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan.L.Rev. 317 (1987), they have not demonstrated by specific evidence that any person on a security classification committee who may hold a racially stereotypic view of black inmates has, because of that view, disproportionately assigned them to administrative segregation.

Plaintiffs rest their case, rather, on the ticketing practices of correctional officers. They have introduced evidence indicating that certain correctional officers harbor racial biases against black inmates; that black inmates occasionally are given tickets for reacting violently to racial slurs from correctional officers; that certain correctional officers ticket black inmates while ignoring the similar conduct of white inmates; that black inmates receive a disproportionate number of major misconduct tickets for non-assaultive offenses, which tend to be subjective; and that the overwhelmingly white correctional staff may harbor stereotypic views about black inmates that may lead them to discriminate against them. Plaintiffs further contend that this disparate ticketing constitutes an informal policy or practice for which the Court can hold the Department of Corrections responsible because the Department implicitly or explicitly encourages such treatment by ignoring inmate grievances of racially discriminatory treatment; not discipling staff for engaging in racially discriminatory behavior; improperly rejecting inmate grievances of racial discrimination related to the major misconduct hearing process; maintaining an ineffective affirmative action plan for hiring black staff;

and maintaining an ineffective program for preparing new employees to interact with black inmates.

In evaluating plaintiffs' claim, the Court must consider "the totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). "Determining whether invidious discriminatory purpose was [or is] a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may available." *Village of Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564. In making this inquiry, the Court should consider, among other factors, whether defendants' actions adversely affect one race more than the other; any prior history of discirminatory practices; the opportunity for discretion to enter into the decision-making process; and any other evidence reflecting the intent of the relevant decision-makers. *Id.* at 266-67, 97 S.Ct. at 564; *McCray*, 467 F.Supp at 195-96.

As I have opined, plaintiffs' statistical evidence of disproportionate placement of black inmates in administrative segregation and punitive segregation is disturbing and significant. I find as a factual matter that a significant percentage of the major misconduct tickets that can lead to placement in administrative segregation are given for non-assaultive offenses that tend to depend on the discretion of the ticketing officer, pls. exh. 711; that black inmates tend to receive more major misconduct tickets, and in particular more tickets for insolence, than white inmates, pls. exhs. 521-S & 521-T[3]; that the disproportionate number of black inmates confined to administrative segregation at the SPSM and the MBP is statistically significant, T at 268, 270, & 275-76; pls. exhs. 510-C & 510-E; that the disproportionate number of black inmates confined to punitive segregation at the SPSM and the MR is statistically signifi-

[3]The Court discounts the significance of these two exhibits slightly because it agrees with defendants that the statistics would be more significant if they were broken out by institution.

cant, T at 271-72 & 276; pls. exhs. 510-C & 510-G; and that black inmates tend to receive a disproportionate number of non-assaultive major misconduct tickets. Chapman T at 85-86 (threatening behavior, disobeying a direct order, and insolence).

I further find that certain correctional officers are racially biased against black inmates, as evinced by their use of racial slurs and other inappropriate racially motivated behavior. *See, e.g.*, T at 960-62 (''burrheads, rugheads, or walking brillo head''), 969-70 (''take your black ass upstairs''), & 972-73 (''smart ass nigger,'' ''half breed''); T at 984-85 (Bojangles tap dance routine); T at 1178 (''jungle bunny, black bastard, black nigger); T at 1276-77 (''niggers, black son-of-a-b's, black m.f.'s''); T at 1374-75 (''nigger this, nigger this, your nigger mammy''); T at 1464 (''these black niggers from Detroit''); T at 1518-19; T at 1809 (''you niggers are all alike''); T at 1854 (''I will kill you, nigger''); T at 1979 (''niggers''); T at 2055-56 (''niggers''); T at 2152-53 (''ex-slaves''); T at 2245-47 (officer yelled insults to inmates over the loudspeaker); and T at 2258-61 (''half-breed, half white boy, half nigger''). This is just a partial listing of the credible testimony I heard on the use of racial slurs and other inappropriate behavior by certain correctional staff. Defendants, moreover, did not attempt to rebut this testimony even though the inmate witnesses specifically named several guards that had engaged in such behavior.

I also find certain correctional staff occasionally ticket black inmates for acts of misconduct while ignoring similar action by white inmates. *See, e.g.*, T at 1180; T at 1272-74; T at 1468-71; and T at 3203-05. Finally, I find that inmates occasionally are given tickets for reacting violently, with words or physical conduct, to racial slurs and other racially derogatory conduct by staff members. See T at 1278-79; T at 1462-63; T at 1915; T at 2135-36; T at 2809-10; & T at 3185-86.

The evidence does not, however, demonstrate that the correctional staff in general intentionally discriminates against black inmates in handing out major misconduct tickets or that the white correctional staff as a whole, or even a majority of the staff, harbor stereotypic views about black inmates that lead them to discriminate against them in handing out tickets. I also do not find that the Department, acting through the named defendants and others with policy-making authority, implicitly or explicitly approves, condones, ratifies, or supports whatever incidents of racially discriminatory ticketing may occur. The evidence does not show that defendants implicitly condone or encourage the issuance of racially motivated tickets by failing to take action to prevent such activity. The evidence also does not demonstrate that defendants' new employee training materials are linked to this problem. Even if I accept Mr. Chapman's testimony on the materials, plaintiffs have not linked the training the new employees receive to incidents of discriminatory ticketing.

[18] Based on the evidence before me, I conclude that plaintiffs have not established by a preponderance of the evidence that defendants intentionally discriminate against black inmates in either the administrative segregation or the punitive segregation process.[4] An intent to discriminate

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[4]I observe that according to defendants' post-trial memorandum regarding race discrimination, they do "generally assign prisoners to segregation on the basis of race." Memorandum at 3. This statement unfortunately is but one example of the many errors defendants have made in their written submissions throughout this case. *See also id.* at 9 ("Obviously, Defendants cannot withdraw to bigger reach of the 9,000 employees in the Department of Corrections at all times, but, fails to establish that there is a pattern and practice of racial derogatory remarks which Defendants have chosen to ignore"). These errors, which include not only typographical errors but also sentences and even entire paragraphs that are completely nonsensical, have sorely taxed the Court's patience and have made it difficult to understand defendants' arguments.

against black inmates is not, on a class-wide basis, a motivating factor in defendants' actions. I reach this conclusion primarily for five reasons: (1) Plaintiffs' statistical evidence, although significant both statistically and as evidence of discriminatory intent, does not by itself support a finding of discriminatory intent. (2) As I already have found, plaintiffs produced little or no evidence that the hearing officers intentionally discriminate against black inmates, although Dr. Christensen did testify that black inmates tend to receive longer sentences than white inmates. T at 302-03. (3) Also as I have already found, plaintiffs produced little or no evidence that the members of the security classification committees intentionally discriminate against black inmates. Defendants' exhibit 101 suggests, moreover, that the committees consider more than simply whether the inmate has received a major misconduct ticket in deciding whether to place him in administrative segregation. See also 3-16-87 T at 84. (4) Plaintiffs simply have not established that black inmates, as a class, are subjected to racially motivated major misconduct ticketing practices. They produced evidence that certain correctional officers are racially biased, but did not establish that these officers disproportionately ticket black inmates as compared to white inmates. They also produced evidence of scattered incidences of discriminatory ticketing, but again did not establish that these incidences are widespread. (5) Finally, I cannot conclude that whatever discrimination in the disciplinary process does occur results from a policy, practice, or custom, whether formal or informal, of the Department of Corrections. *See Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 561 (1976).

This was a difficult issue for me to decide, as were the other racial discrimination issues, and I certainly do not intend by my opinion to exonerate the Department of Corrections entirely. Plaintiffs did not meet their burden of proof. I, however,

found their evidence to be deeply disturbing. The Department, moreover, did not rebut plaintiffs' extensive testimony of individual incidents of racially discriminatory conduct by correctional officers and did not provide a rational explanation for the racial disparity in inmates confined in administrative segregation and punitive detention. Deputy Director Bolden's historical explanation was interesting, but vague and not supported by any evidence. See 3-16-87 T at 84-86. Thus, although the Court denies plaintiffs' request for relief and enters judgment for defendants on this issue, it certainly encourages defendants to explore the situation and to attempt to remedy whatever individual wrongs are occurring.

Plaintiffs also contend that defendants subject black inmates to racial harrassment in the form of racial slurs. In the Court's February 27, 1987 opinion on defendants' Rule 41(b) motions, it considered the evidence on racial slurs as a separate ground for relief as well as evidence of defendants' discriminatory intent in assigning inmates to administrative segregation and punitive detention. Opinion of Feb. 27., 1987 at 21-22. Upon further consideration of plaintiffs' pleadings, the parties' written submissions, and the evidence produced at trial, the Court is not certain that plaintiffs intended to raise the use of racial slurs against black inmates as a separate ground for relief. I will decide the issue, however, for two reasons. First, plaintiffs presented substantial evidence on the use of racial slurs by correctional staff and defendants had an adequate opportunity to rebut that evidence. Secondly, the parties discuss the racial slur issue as a separate claim for relief in their written submissions. See Plaintiffs' September 17, 1986 Supplemental Brief on the Issue of Racial Discrimination at 16-19; Defendants' December 9, 1986 Motion for Involuntary Dismissal at 14-20; Plaintiffs' December 22, 1986 Brief in Response to Defendants' Motion to Dismiss at 5-6; Defendants' January 20, 1987 Reply to Plaintiffs' Brief at 4-8.

Although the courts are not in complete agreement on this issue, I believe that prison officials violate the Fourteenth Amendment rights of black inmates if they intentionally subject them to a pattern of racial harassment. The use of rough language in a prison context, even if such language offends the sensibilities of inmates, does not violate the Constitution. *See Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir.1986). Even an occasional racial slur, unconnected to other acts of racial harassment or abuse, does not violate the Constitution. Prison officials do violate the Constitution, however, if they intentionally subject black inmates to a pattern of racial harassment. *Cf. Bohen v. City of East Chicago*, 799 F.2d 1180, 1185-86 (7th Cir.1986) (holding that "[s]exual harassment of female employees by a state employer constitutes sex discrimination for purposes of the equal protection clause of the fourteenth amendment"). If the instances of racial harassment are sufficently frequent so as to create an atmosphere of racial tension and hostility, then the equal protection clause is violated even if the harassment is not connected to other kinds of official action, such as a denial of employment or placement in administrative segregation. In considering such a claim on a class-wide basis, a court must consider the frequency of the acts of racial harassment; the need and justification, if any, for such actions; the degree of injury suffered by the inmates; and whether the actions were taken in good faith or "maliciously and sadistically for the sole purpose of causing harm." *See Burton*, 791 F.2d at 100. In addition, of course, the Court must consider whether any unconstitutional harassment that does exist reflects a policy, practice, or custom of the Department of Corrections.

I have already discussed the instances of racial slurs supported by the evidence in this case. I reiterate that the testimony quoted in this opinion is only a portion of the credible testimony I heard on the use of racial slurs, and other acts

of racial harassment, by correctional staff. I further find that defendants have not contested the existence of this harassment, although they certainly contest that it is widespread or provides a basis for relief, and have not established any need or justification for it. The racial slurs, moreover, are not made in good faith but rather for the sole purpose of antagonizing black inmates and inflict emotional and psychological pain on the inmates. Finally, I find that the use of racial slurs is sufficiently frequent to support a claim for class-wide relief. I specifically do not find that most correctional staff engage in this kind of behavior. A sufficiently large number do, however, to expose black inmates to a constitutionally intolerable atmosphere of racial harassment.

This finding does not end my inquiry, though. There remains the issue of whether this atmosphere of racial harassment reflects a policy, practice, or custom of the Department of Corrections. Defendants argue vigorously that it does not. They observe that their official policy forbids employees from discriminating "on any racial, sexual, or ethnic basis"; defs. exh. 93; that they have a well-established inmate grievance procedure which allows inmates to file grievances alleging racial discrimination directly with the Central Office, see T at 138-54; *See also* defs. exh. 100 (establishing a Warden's Forum); that they have an active affirmative action policy for their employees, see defs. exhs. 87, 17, & 18; 3-18-87 T at 60-89; that they provide new employees with extensive training on human relations in a prison setting, see defs. exhs. 90, 124, & 128; and that they maintain an effective employee disciplinary system. *See* defs. exhs. 109, 110, & 319a. Plaintiffs respond that defendants' policies, while they look good on paper, are ineffective. In particular, they argue that the inmate grievance procedure and defendants' employee disciplinary policy fail to prevent the use of racial slurs and other forms of racial harassment.

[19] On this issue, I find that plaintiffs have established that the racial harassment from which black inmates suffer because of racial slurs represents a policy, practice, or custom of the Department of Corrections. Plaintiffs presented an extremely strong case on this issue. Defendants acknowledged that their staff uses racial slurs, *see e.g.*, 3-17-87 T At 4; 3-17-87 T at 142; 3-18-87 T at 33-34, but testified that they rarely, if ever, discipline staff members for engaging in racially discriminatory behavior. *See* 3-17-87 T at 142-43; 3-19-87 T at 13; 3-18-87 T at 34-35. The inmate grievance system is ineffective in rectifying the racial slur situation: defendants almost uniformly demand substantiation, accept the staff officer's denial, and reject the grievance. *See, e.g.*, 3-19-87 T at 13; pls. exhs. 204, 208, 223, 249, 252, 254, 525, 537-1, 548, 574, & 755; *see also* T at 2681-83 (SPSM Warden ignored inmate racial complaints). Even when an inmate provides the names of inmate witnesses, the grievance may be rejected without an investigation of the inmates. *See* pls. exh. 258. Finally, and most egregiously, the Court heard repeated, credible, testimony about certain correctional officers who use racial slurs on a consistent basis, with no rebuttal from defendants or any attempt to show that such officers have been the subject of disciplinary action. *See, e.g.*, T at 1310, 1809, 2055-56, 2137, & 2590-91.

In light of this evidence, the Court must conclude that the Department of Corrections explicitly or implicitly authorizes, approves, or knowingly acquiesces in the unconstitutional harassment of black inmates by certain staff officers. *See Hays v. Jefferson County*, 668 F.2d at 874. The Sixth Circuit has indicated that notice alone of unconstitutional conduct is insufficient to establish supervisory or municipal liabiity. *Bellamy v. Bradley*, 729 F.2d at 421. A practice does constitute Departmental policy or custom, however, when high-level supervisory officials are aware it occurs and by their actions inform

their subordinates they will take no action to prevent it. *Brandon v. Allen*, 645 F.Supp. 1261, 1269 (W.D.Tenn.1986) ("A practice is to be deemed an official custom . . . if it occurs with sufficient frequency and notoriety as to make it known to responsible supervisory officials and those officials decline to take effective action to end that practice").

The Department is making some effort to address racial grievances as they arise, to maintain employee discipline, and to promote affirmative action programs within its workforce. Mr. Chapman, moreover, (1) could not, in my opinion, offer any sound advice on how supervisory officials should react when a correctional officer denies making a racial slur and it is just his word against that of the inmate, Chapman T at 137-40; (2) approved of the Department using a former inmate to handle grievances at the third step, *id.* at 204; and (3) suggested only that defendants could improve the situation by investigating racial slur grievances more seriously and monitoring the grievances for patterns. *Id.* at 125. I cannot, however, accept defendants' testimony that they take seriously grievances and other complaints about racial slurs. The named defendants, as individuals, do not condone the use of racial slurs. In their official capacities as members of the Department of Corrections, however, they consciously, voluntarily, and with reckless indifference to the rights of black inmates have failed to implement policies that would prevent this situation from occurring, and affirmatively encourage its continuation. Similarly, the vast majority of the correctional officers in the Department does not use racial slurs. It takes only a minority, however, to create an atmosphere of racial harassment.

In summary, defendants have adopted the kind of attitude toward this situation that supports a finding that the use of racial slurs towards black inmates exists as an official or unof-

ficial policy or custom of the Department of Corrections. *Cf. Bohen*, 799 F.2d at 1189 (municipal liability existed where "[c]omplaints by the victims of sexual harassment were addressed superficially if at all, . . . the department had no policy against sexual harassment[,] . . . sexual harassment was the general, on-going, and accepted practice at the . . . Department, and high-ranking, supervisory, and management officials responsible for working conditions at the department knew of, tolerated, and participated in the harassment"). I will give defendants sixty (60) days from the date of this opinion to submit a proposed solution to this problem. Plaintiffs will have thirty (30) days to respond to defendants' proposal.

[20] The fourth racial discrimination claim is plaintiffs' contention that defendants intentionally segregate by race the dining room servers, the serving lines, and the eating areas. I find that the inmate dining lines (except at the central complex, where there is only one line) and the inmate eating areas generally are segregated by race. Defendants' photographs indicate that the dining lines and the eating areas occasionally are racially integrated. Defs. exhs. 344, 345, 347, 348, 366, 367, 370, & 371. The overwhelming weight of the testimony, however, from both defendants' witnesses and plaintiffs' witnesses, was that the dining lines and the eating areas are segregated by race. *E.g.*, T at 2239-41; T at 2332-33; T at 3076; T at 2027-28; 3-17-87 T at 116; 3-17-87 T at 163. I find that the inmate serving lines occasionally are segregated by race. T at 2028; T at 3059-60; T at 3044. I also find that on rare occasions, individual staff members direct inmates to a particular line or area of the dining hall. T at 2367-68; T at 972. I do not find that this occurs on a regular, or even a frequent, basis, and I specifically do find that the correctional staff almost always allows inmates to choose which line they wish to enter. See T at 1931; T at 2121; T at 2178; T at 2277-78; T at 2350-52; T at 2375-77. I also do not find sufficient evi-

dence in the record for me to conclude that defendants' staff assigns inmate servers to the serving line by race.

Plaintiffs posit three arguments in support of their claim. First, they argue that defendants historically have officially segregated their dining lines and eating areas. Secondly, they argue that defendants have the ability to desegregate the dining lines and the seating areas (either by establishing only one dining line or by requiring inmates to go into integrated lines) and to desegregate the serving lines (by assigning the servers to integrated lines). Thirdly, they argue that in a prison context, inmates cannot freely choose where to eat, sleep, or work. The Court has carefully considered plaintiffs' arguments and finds that it must reject them and enter judgment for the defendants on this issue.

I do not find that defendants historically have had officially segregated dining lines and eating areas. The only testimony on this issue came from the former Director of the Department of Corrections, Perry Johnson, who testified that "[d]uring the 1950s, the department . . . practiced that kind of de facto segregation throughout the prison system, in which there was considerable segregation with respect to institutional assignments." 3-17-87 T at 41. Although this testimony supports an inference that defendants intentionally segregated the dining halls by race in the 1950s, the Court is not required to draw that inference and there is no explicit testimony that any intentional discrimination that did exist in the dining halls in the 1950s lasted into the 1960s and the 1970s. See pls. exhs. 47 at 11 (noting that inmates integrate themselves in the dining rooms) & 48 at 21 (noting only the presence of racial segregation in the dining halls). Plaintiffs' historical evidence on this issue is remote, speculative, and not very persuasive, particularly given the rapid turnover of inmates in a prison system.

Secondly, although defendants may have the ability to desegregate the dining areas, they must do so only if their current actions violate the inmates' constitutional right to be free from racially discriminatory treatment. In this context, absent prior *de jure* segregation, an explicit acknowledgement of prior intentional *de facto* segregation, or a finding of present intentional segregation, defendants are not affirmatively obligated to eradicate the presently existing segregation in the dining halls. *See Thomas v. Pate,* 493 F.2d 151, 155 (7th Cir.1974), *cert denied,* 419 U.S. 879, 95 S.Ct. 143, 42 L.Ed.2d 119 (1975); *accord Bazemore v. Friday,* ____ U.S. ____, ____, 106 S.Ct. 3000, 3016-17, 92 L.Ed.2d 315, 339-41 (1986) (Brennan, J., dissenting in part); *Green v. County School Board of New Kent County,* 391 U.S. 430, 437-38 (1968).

Finally, the Court finds little evidence to suggest that inmates do not voluntarily choose a dining line or an eating area. I recognize that often in a prison setting, "where hostility of every kind is rampant, freedom of choice is but a gauze for discrimination." *Jones v. Diamond,* 636 F.2d 1364, 1373 (5th Cir. 1981) (*en banc*), *cert dismissed sub nom., Ledbetter v. Jones,* 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981). The dining hall situation in this case, however, is far different than the housing situation in *Jones*, where a newly admitted black inmate was given the "choice" of confinement in a "cell crowded with white prisoners, some convicted of major felonies," or a cell crowded with black prisoners. *Id.* I agree with plaintiffs that this situation also is different than the 4-H and Homemaker Clubs issue the Supreme Court decided in *Bazemore* because in a prison setting inmates generally must go to the dining hall and prison officials have the authority to establish dining lines and eating areas. *Compare Bazemore,* ____ U.S. at ____, ____, 106 S.Ct. at 3012-13, 92 L.Ed.2d at 335-36. Absent evidence, however, that defendants presently direct inmates into particular lines or eating areas,

or otherwise affirmatively encourage segregation in the dining halls, the Court finds no basis for granting plaintiffs the relief they request.

[21] Plaintiffs' final racial discrimination claim is that defendants intentionally discriminate against black inmates by assigning white inmates to the highest job levels while assigning black inmates to the lowest job levels and the less prestigious jobs. In support of this claim, plaintiffs offered statistical evidence indicating that black inmates are disproportionately underrepresented in the most desirable jobs, *i.e.*, the industry and maintenance jobs; are disproportionately overrepresented in the least desirable jobs, in particular the kitchen assignments; and are disproportionately underrepresented in the highest job levels within each job category. They sought to prove that these disparities reflect intentionally discriminatory actions by the defendants and persons to whom they have delegated policy-making authority by introducing testimony and other evidence indicating that persons responsible for employment assignments have racially discriminatory attitudes and that black inmates have suffered from specific incidences of discrimination. For the following reasons, the Court concludes that plaintiffs have not satisfied their burden of proof on this issue.

The Court can make a number of factual findings from the evidence. Inmates in general tend to prefer jobs in the Michigan State Industries, in other kinds of industrial work, and in maintenance, and tend to dislike jobs in the kitchen. *See, e.g.*, T at 211-12; pls. exh. 7 at 79; pls. exh. 273 at 20; pls. exh. 48 at 20; pls. exh. 718 at 56 & 60. Furthermore, plaintiffs' statistics indicate that racial disparities exist in inmate employment, *i.e.*, the racial balance in some job categories is not proportional to the racial balance of the institution as a whole. These disparities exist in particular in the kitchen assignments at the

subject institutions, where black inmates tend to be overrepresented, see pls. exhs. 521-C, 521-D, 521-E, 521-F, 521-I, & 521-K, and in the industry and maintenance assignments at the subject institutions, where black inmates tended to be underrepresented. See pls. exhs. 521-C, 521-D, 521-E, 521-F, 521-G, 521-H, 521-I, 521-J, & 521-K. In general, as Dr. Christensen concluded, in "the most desirable jobs . . . there is an under-percentage of non-whites" while in "the least desired jobs of kitchen, there is an over-percentage of non-whites." T at 223.

The statistics do not, however, show any overwhelming racial disparities in inmate employment. In addition, they demonstrate that on many occasions the disparity, if any, is insignificant. See pls. exhs. 521-C (1982—CC Kitchen & SC Factory & Maintenance); 521-D (1983—CC Factory & Maintenance, NC Kitchen, & SC Kitchen & Factory); 521-E (1984—CC Factory & Maintenance, NC Kitchen, Factory, & Maintenance, & SC Kitchen & Factory); 521-F (1985—CC Maintenance, NC Kitchen, Factory, & Maintenance, & SC Factory & Maintenance); 521-G (1984—MBP-I Kitchen, Factory, & Maintenance; 1983—MBP-I Kitchen & Maintenance; 1982—MBP-I Kitchen, Factory & Maintenance); 521-H (1985—MBP-I Kitchen); 521-I (1986—MBP-I Kitchen; MBP-T Kitchen, Factory, & Maintenance); 521-J (1984—MR Kitchen, Factory & Maintenance; 1983—MR Kitchen & Factory; 1982—MR Kitchen & Factory); & 521-K (1985—MR-Inside Factory). The general trends are as Dr. Christensen suggests, but the statistical evidence is not overwhelmingly persuasive, and in fact is much less persuasive than the statistical evidence on racial disparities in administrative segregation, punitive detention, and protective custody. I note in particular that the statistics for the MBP, pls. exhs. 521-G, 521-H, & 521-I, are not persuasive in light of plaintiffs' contention that black in-

mates in this institution suffer the most from racially discriminatory treatment.

There also is evidence of racial disparities in pay levels within job categories. Again, the evidence suggests that blacks are underrepresented at the higher levels and overrepresented at the lower levels. Pls. exhs. 521-M, 521-N, 521-O, & 521-P. As with the other statistical evidence, however, these exhibits do not provide significantly persuasive support for plaintiffs' claim. There was credible testimony that on occasion black inmates are discriminatorily assigned to less desirable jobs, are discriminatorily passed over for promotions in favor of white inmates, and are not assigned employment for which they are well-qualified. See, *e.g.*, T at 2002-03; T at 2858-59; T at 2916 (kitchen all black); T at 3074-75 (hard kitchen jobs handled by blacks; easy jobs handled by whites); T at 3022 (whites had clerical jobs); pls. exh. 436C (discussing plans to assign additional white inmates to industries even though blacks apparently were underrepresented and available); T at 2786-91 (passed over for set-up man in favor of whites); T at 2711-14 (passed over for jobs as ordering clerk and head clerk in favor of whites); T at 3160-65 & 3172 (promoted more slowly than white inmates); & T at 3001-05 (white inmates with less seniority received promotions first). I cannot find, however, that these instances of discriminatory treatment are widespread or represent a general pattern of treatment of black inmates. Some of the instances, for example, appeared to reflect simple mistakes or oversight on the part of correctional staff. *E.g.*, *id.*, at 3005-06 (white supervisor assisted witness in getting promotion to a seven position).

Plaintiffs presented credible testimony of racially biased attitudes on the part of some of the correctional staff involved in inmate employment. *See* pls. exh. 35 at 59-60 (classification director for the SPSM-CC and part of the NC indicated

belief that blacks are afraid of electricity and should not be assigned to maintenance); T at 2687 (same person using racially derogatory remark); pls. exh. 712 (supervisor at SPSM Machine Shop called MDOC Director a "nigger"; did not realize the remark was offensive); pls. exh. 450 (assistant business manager given counselling memorandum for using racial slur); T at 1990 (civilian kitchen supervisor stated she did not "trust niggers"); T at 1452 (MBP librarian referred to law clerk as "her boy"); T at 2368-69 (custodial supervisor asked "nationality" of college trained black inmate who objected to custodial training assignment); & T at 1979 (MBP food service director stated "he didn't want any niggers working" in the clerk's position because "he couldn't trust them"). I do not, however, find that this bias is widespread, that black inmates regularly are denied desirable employment or higher level positions within a job category because of such bias, or that the Department either is aware of intentionally discriminatory job actions or implicitly or explicitly condones or encourages such actions. The Court does not agree that the legislative reports on the 1981 riots "describe [an] abundance of" racially stereotypic attitudes by staff who "hire prisoners for jobs and promote them on these jobs," see plaintiffs' Dec. 22, 1986 rule 41(b) brief at 15; that, in general, "staff supervising jobs in the subject institutions . . . succumb to the attitude that Caucasian prisoners are more capable of functioning independently and supervising the work of prisoners within their departments," *id.* at 14; or that a significant "number of staff responsible for the assignment of prisoners to jobs and the promotion of prisoners within the job have racially demeaning attitudes towards people of color." Plaintiffs' Trial Brief at 8.

Certainly, and regrettably, incidents of intentional racial discrimination occur in inmate employment in the subject facilities. Defendants made no attempt to rebut plaintiffs'

testimony on these incidents. In particular, the Court was shocked at the apparent attitude of the Director of Classification at the SPSM toward black inmates, as evinced by the deposition statement it cited previously. It does not find, however, that plaintiffs have linked such attitudes to a pattern, or even frequent incidents, of racially discriminatory treatment of black inmates. The Court also was disturbed by plaintiffs' evidence on kitchen assignments. The statistical evidence shows that blacks are rather consistently overrepresented on such assignments at the SPSM, and there is a significant amount of testimony in the record indicating that within these assignments, black inmates are given the least desirable jobs. See T at 3021-23 (kitchen assignments at the central complex). Even in this area, however, the Court does not find that plaintiffs have produced sufficient evidence to establish that any intentional or purposeful discrimination that may occur constitutes a policy, practice, or custom of the Department of Corrections.

In accordance with the above findings of fact, I conclude that I must reject plaintiffs' claim of racial discrimination in inmate employment. I do not reject this claim because the Department has formulated some sound policies in this area or because the named defendants conclusorily testified that the policies are implemented. I reject it, rather, because plaintiffs have not established the necessary link between the acts of misconduct that occur and any policy, custom, or practice of the Department of Corrections. *See Rizzo*, 423 U.S. at 371, 96 S.Ct. at 604; *Hays*, 668 F.2d at 874. They have not, moreover, established that those supervisory staff who apparently do have racially discriminatory attitudes are responsible for the statistical disparities in black employment. They come the closest to this at the SPSM-CC. Even there, however, black inmate representation in employment is not consistently and drastically disproportionate to their represen-

tation in the inmate population, see pls. exhs. 521-C, 521-D, 521-E, & 521-F, and there is little other evidence of a pattern of intentionally discriminatory treatment by the Department of Corrections. *Compare Bohen*, 799 F.2d at 1189 (department liability established where "sexual harassment was the general, on-going, and accepted practice").

The Court in one sense has been somewhat reluctant in reaching the conclusions it has on plaintiffs' racial discrimination claims. I believe, of course, that they are required under the law and by the evidence presented at trial. I reiterate, however, that I was deeply disturbed by plaintiffs' evidence. Racial discrimination has been and is such a societal plague that I firmly believe every governmental entity is obligated, albeit not always constitutionally required, to expend every effort to eradicate it completely from public life. This moral and societal obligation extends in particular to the Michigan Department of Corrections, to which society has entrusted the care, treatment, and punishment of those who predominantly come from the politically, economically, and socially powerless sectors of our society, and which has almost complete and total control over its inmate population. I regret that the Department is not completely meeting that obligation.

In accordance with the above opinion, the Court will enter a Judgment and Order granting plaintiffs partial relief on their severed claims. With regard to the appealability of my Judgment and Order, despite my earlier request that the parties brief the issue of the application of Rule 54(b) certification, I agree with plaintiffs that 28 U.S.C. § 1292(a)(1) provides the proper guidance. For the sake of clarity, and recognizing that the Sixth Circuit may well disagree on whether they are immediately appealable, the Court will indicate its intent as to its decisions. I intend my decisions on the following claims for relief, granting or denying injunctive relief, to be final: (1)

the lack of adequate winter clothing; (2) the lack of adequate access to toilet and lavatory facilities at the RPC; and (3) racial discrimination, except for the racial slurs claim. I intend for my decisions on the remaining substantive claims for relief to become final grants of injunctive relief when I order defendants to implement appropriate remedial plans. *See Groseclose v. Dutton*, 788 F.2d 356 (6th Cir.1986).

JUDGMENT AND ORDER

In accordance with the opinion dated August 10, 1987;

IT IS HEREBY ORDERED that plaintiffs' request for relief concerning defendants' system of handling incoming legal mail is GRANTED and that JUDGMENT is entered FOR plaintiffs and AGAINST defendants on this issue; defendants shall have sixty (60) days from the date of this opinion to submit a revised system for allowing inmates to invoke their constitutional right to be present when their clearly marked legal mail is opened and inspected for contraband;

IT IS FURTHER ORDERED that JUDGMENT is entered FOR plaintiffs and AGAINST defendants on plaintiffs' claim that they are denied adequate winter clothing in violation of the Eighth Amendment; defendants are hereby ENJOINED to provide inmates with constitutionally adequate winter coats, hats, gloves, and, under the circumstances specified in the opinion, boots;

IT IS FURTHER ORDERED that JUDGMENT is entered FOR plaintiffs and AGAINST defendants on plaintiffs' claim that inmates at the Riverside Correctional Facility are denied adequate access to toilet and lavatory facilities in violation of the Eighth Amendment; defendants shall have sixty (60) days from the date of this opinion to submit a plan for remedying the constitutional deficiencies that exist at the RCF;

IT IS FURTHER ORDERED that JUDGMENT is entered FOR defendants and AGAINST plaintiffs on plaintiffs' claim that inmates at the Riverside Psychiatric Center are denied adquate access to toilet and lavatory facilities in violation of the Eighth Amendment;

IT IS FURTHER ORDERED that JUDGMENT is entered FOR plaintiffs and AGAINST defendants on plaintiffs' claim that inmates at the subject facilities are denied their fundamental constitutional right of access to the courts; defendants shall have sixty (60) days from the date of this opinion to submit a plan to remedy the constitutional defects in their current system of providing inmates with access to the courts;

IT IS FURTHER ORDERED that JUDGMENT is entered FOR defendants and AGAINST plaintiffs on plaintiffs' claim that black inmates at the subject facilities are, as a class, subjected to intentional racial discrimination in violation of the equal protection clause of the Fourteenth Amendment; JUDGMENT, however, is entered FOR plaintiffs and AGAINST defendants on plaintiffs' claim that they are subject to racial harassment in the form of racial slurs; defendants shall have sixty (60) days from the date of this opinion to submit a proposed solution for this violation;

IT IS FURTHER ORDERED that defendants' April 23, 1987 Request for Judicial Notice is DENIED:

IT IS FURTHER ORDERED that defendants' May 7, 1987 Motion to Strike Testimony of Ronald Christensen is DENIED;

IT IS FURTHER ORDERED that defendants' oral motion to decertify the plaintiff class on the racial discrimination issue is GRANTED in part and DENIED in part; the class is decertified and no judgment is rendered for either party on the issue of the constitutional validity of defendants' anti-discrimination in inmate employment policy.

APPENDIX C

Gary KNOP, John Ford, William Lovett, II, Ramando Valeroso, Gus Jansson, Pat Sommerville, Vernard Cohen, T. Jon Spytma, Robert Shipp, Butch Davis, Ron Mixon, and Kerwin Cook, individually and on behalf of all other persons similarly situated, Plaintiffs,

v

Perry M. JOHNSON, Robert Brown, Jr., Dale Foltz, John Jabe, Theodore Koehler, John Prelesnik, and Jack Bergman, Defendants.

No. G-84-651.

United States District Court
W.D. Michigan, S.D.

May 5, 1988.

National Prison Project of the American Civil Liberties Union Foundation, Washington, D.C. by Elizabeth Alexander, Adjoa Aiyetoro, for plaintiffs.

Frank J. Kelley, Atty. Gen., State of Mich., Lansing, Mich. by Thomas C. Nelson, Brian MacKenzie, for defendants.

OPINION

ENSLEN, District Judge.

Upon the completion of a lengthy bench trial on the liability issues in this matter, the Court directed defendants to submit proposed plans to remedy the constitutional violations

found to exist at the subject institutions. *See, Knop v. Johnson,* 667 F.Supp. 467 (W.D.Mich.1987). Defendants submitted their proposed plans on October 13, 1987. Plaintiffs submitted their comments on those plans, and their own recommendations on November 17, 1987. On March 1, 1988 the Court began a four day hearing on the entry of the remedial plans proposed by both parties. The order which follows this Opinion is the product of the Court's consideration of the testimony received at that hearing on the entry of the remedial plans proposed by both parties. The order which follows this Opinion is the product of the Court's consideration of the testimony received at that hearing and the plans submitted by both parties.

In devising a remedial order to redress the numerous constitutional violations found to exist in this Court's Opinion and Order of August 10, 1987, the Court was not unmindful of the Sixth Circuit's admonition that a district court must "impose the least intrusive remedy available" to remedy unconstitutional conditions in state prisons. *Kendrick v. Bland,* 740 F.2d 432, 438 (6th Cir.1984). In my order, I have attempted to abide by the restraints imposed by *Kendrick,* and by the precepts of comity and federalism so often noted in similar cases. *See State of Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 695-96, 99 S.Ct. 3055, 3079, 61 L.Ed.2d 823 (1979); *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Milliken v. Bradley,* 433 U.S. 267, 280-81, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971); *Ramos v. Lamm,* 639 F.2d 559 (10th Cir.1980), *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). I have also attempted to utilize the "healthy sense of realism" noted in *Procunier v. Martinez,* 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40

L.Ed.2d 224 (1974), by deferring, wherever possible, to the judgment of prison administrators, and by retaining, to the largest degree possible, their discretion to control matters of internal discipline. *See also, Bell v. Wolfish*,441 U.S. 529, 548, 99 S.Ct. 1861, 1879, 60 L.Ed.2d 447 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 93 S.Ct. 1827, 1837, 36 L.Ed.2d 439 (1973); *Ruiz v. Estelle*, 679 F.2d 1115, 1145-1146 (5th Cir.1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983).

[1] Comity, federalism and appropriate deference to prison administrators notwithstanding, it remains this Court's duty to devise an order which will promptly and effectively remedy the constitutional inadequacies noted in my opinion of August 10, 1987. "It is fundamental that the federal forum, as the ultimate guardian of constitutional rights, possesses the authority to implement whatever remedy is necessary to rectify constitutionally infirm practices, policies or conduct." *Kendrick*, 740 F.2d at 437. *See also, Hutto v. Finney*, 437 U.S. 678, 688 note 9, 98 S.Ct. 2565, 2572 note 9, 57 L.Ed.2d 522 (1979) ("Once invoked, 'the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies' ") (*quoting, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971)).

[2] 1. *Toilets at RCF*. Defendants originally requested that they be given three years to construct the necessary toilet facilities at this institution. George Walter, the department's Physical Plant Division Manager, testified in his deposition, however, that the project could be completed within 26 months, if the defendants attended to it on an expedited basis. Walters Deposition of February 24, 1988 at 13-15 and Exhibit 1. He further testified that the project could take between five and six years to complete, if it were allowed to filter

through the "normal process" of obtaining funding, accepting bids and construction.

The Court chose to adopt the earlier completion date as requested by plaintiffs because of the clear need to remedy this unconstitutional condition as quickly as possible. Prisoners will continue to be incarcerated in locked cells without sanitary toilet facilities until the construction mandated by this Order is completed. The unconstitutional condition will continue to exist, and to impact directly upon those prisoners until that time. Further, the Court is well aware from its experience in implementing the consent decree in *United States v. State of Michigan*, No. G-84-63 (W.D.Mich.), that construction delays are inevitable, and often unavoidable, and that the only way to insure reasonably prompt completion of such a project is to impose a strict deadline upon it. Obviously, as the order itself indicates, the Court is willing to accept a certain amount of delay in the completion of this project, but the court can see no reason to build that delay into its order at the outset. Thus, I have chosen to impose a construction deadline which will require defendants to attend to this matter promptly, and which will allow the Court and the parties to take delays into consideration as they occur.

2. *Legal Mail.* This aspect of the order is essentially consistent with defendants' proposed plan, except that it remedies the most serious omission of that plan by providing a means for notifying current prisoners of the change in the legal mail policy. I have given defendants discretion to adopt an appropriate method for notifying these prisoners of the new policy. The Court notes that, notwithstanding the requirement that defendants inform this Court of their plan to notify current prisoners of the change, defendants are required to begin informing new prisoners of the policy immediately. The Court notes further that it would be prepared to accept a notice plan

for current prisoners which is similar to the plan adopted by the parties to notify class members of the impending dismissal of certain claims in this action. In other words, the Court would accept a notice plan which provides for posting of the new regulation on bulletin boards in general population housing units and for individual notice to prisoners in segregation units or to prisoners who would not otherwise have access to those bulletin boards.

[3] 3. *Racial Slurs*. This portion of the order presented the most difficult issue for the Court to resolve. The Court heard a great deal of testimony both at trial and at the remedial hearing regarding the defendants' employee discipline policy, its collective bargaining agreement, the Civil Service Regulations and the need for flexibility and discretion in resolving personnel matters. In my opinion of August 10, 1987, I found that the defendants had violated the Constitution by intentionally subjecting black inmates to a pattern of racial harassment, in the form of racially derogatory conduct by corrections officers. Opinion at 76. I further found that, while the defendants' official employment policies prohibited racial discrimination by staff, the defendants rarely, if ever, disciplined staff for engaging in such conduct. In addition, I found that the defendants' requirement that allegations of racially derogatory conduct be substantiated by other staff members effectively prevented such discipline from occurring. *See,* Opinion at 77-79; 3-17-87 Tr. at 142-43; 3-18-87 Tr. at 34-35; 3-19-87 Tr. at 13; Defendants' Exhibits 100, 1091 110 and 319a. I thus concluded that the defendants, acting in their official capacities, had "consciously, voluntarily and with reckless indifference to the rights of black inmates . . . failed to implement policies that would prevent this situation from occurring and [that the defendants] affirmatively encourage its continuation." Opinion at 79.

The testimony by defense witnesses at the remedial hearing essentially mirrored the testimony considered by the Court in its August 10, 1987 Opinion. Defendants' proposed remedial plan would only continue the ineffective policies of staff training and counselling currently in place. I heard no testimony at the remedial hearing which convinced me that the defendants' current policies would be any more effective at eliminating the use of racial slurs by corrections officers now than those policies have been in the past. Moreover, defendants' proposed plans contained no provision for remedying the most glaring deficiency in the current policies — the requirement that inmate allegations of racially derogatory staff conduct be corroborated by other staff before disciplinary action is considered.

In short, I found that a constitutionally infirm policy existed, even in light of the anti-discrimination and employee discipline policies adopted by the defendants, because the plaintiffs clearly showed at trial that corrections officers were rarely, if ever, disciplined for engaging in racially derogatory conduct. The defendants' proposed plan, although it would achieve the somewhat salutary goal of retaining departmental control over personnel policy, does nothing to alleviate that constitutional deficiency. It thus appears to the Court that the defendants have had an opportunity to remedy unconstitutional policies without federal interference and have failed to do so. A more intrusive remedial order is not only appropriate, it is constitutionally required. *See, Kendrick,* 740 F.2d at 439 ("In the event that the state fails to avail itself of the deferential opportunity to correct its constitutional defects with minimal federal intrusion, the federal court may implement a more intrusive remedy"). *See also, Hutto v. Finney,* 437 U.S. 678, 688 note 9, 98 S.Ct. 2565, 2572 note 9, 57 L.Ed.2d 522 (1979); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971).

The Court was persuaded by the testimony of plaintiffs' expert witness, Mr. McManus, that the only way to eliminate racially derogatory conduct by staff is to send staff a clear message that such conduct simply will not be tolerated by the prison administration. The most effective way to send that message is to impose and enforce harsh penalties for such unacceptable behavior. Defendants' proposed policies of training and counselling are targeted toward changing the corrections officers' hearts and minds rather than toward changing their conduct. The Court would be the first to agree that changing bigotted attitudes is the ultimate goal of any policy to eliminate discriminatory conduct, but the fact remains that staff conduct and not staff "attitudes" created the constitutional violation, and it is the conduct which must change in order to remedy that violation. If changes in attitudes follow, so much the better, but the Court will not adopt an order which ignores very real, current behavior by staff in the hope that at some unforeseeable time in the future bigotted staff members will either quit their jobs or change their attitudes. As Mr. McManus testified, this is essentially a management problem and, as I found in my August 10 Opinion, the prison administrators have demonstrated their unwillingness or inability to deal with this problem in a realistic, firm manner. The Court has no alternative, given this situation, but to usurp some measure of the defendants' discretion as administrators in order to insure that the constitutional violation is remedied.

Thus, the Court has taken the somewhat drastic step of mandating particular disciplinary actions in the event that racially derogatory conduct is found to have occurred. In so ordering, the Court was not unmindful of the due process rights of public employees, or of the defendants' obligations under the current disciplinary procedures, not to supplant them. Defendants are, of course, encouraged to continue the training and counseling programs currently in place.

In addition, the Department of Corrections retains substantial input in the employee discipline process, by virtue of the director's ability to comment upon disciplinary actions recommended by the panel. Thus, considerations of personnel policy which might otherwise escape the attention of the panel will be brought to its attention, and the panel retains authority to modify its disciplinary order in light of those considerations.

The Court is now unaware that inmates may use the disciplinary process contemplated by its order to harass corrections officers by filling frivolous or unfounded claims of racially derogatory conduct. First, the Court has every confidence that the Ombudsman's panel established by this Order will be able to recognize such grievances, and to deal with them in the appropriate fashion. Second, the Order provides that past uncorroborated allegations of such conduct may be used only in very limited instances, and only in those instances where they would appear to be most helpful. I have attempted to resolve the tension between the due process rights of corrections officers and the obvious fact that most inmate complaints of racially derogatory conduct are ignored or go unsubstantiated by staff in two ways. First, the order provides that lack of staff corroboration will not automatically resolve the grievance in favor of staff. Second, it provides that records of all grievances be mainained and severely limits their use. Thus, if a pattern of frivolous complaints by a particular inmate develops, or if a pattern of non-frivolous, but unsubstantiated complaints against a particular staff member develops, the panel may take this into account in deciding whether to modify a disciplinary finding or in considering a grievance for which there is no staff corroboration. Third, the order attempts to deal with the problem of unsubstantiated complaints by providing a method for mediating such disputes. It is hoped that staff and inmates will be able to resolve such grievances through this mediation process, without the necessity of formal

disciplinary action against either the staff member or the inmate involved. However, the panel retains final authority to order formal discipline, should the mediation process fail.

Finally, the order requires the Ombudsman's Office to main tain a record of each grievance filed alleging racially derogatory conduct, and the result of that grievance. As noted above, these records may only be used for very limited purposes. In addition, the Ombudsman's Office will use the records to prepare an annual report for the Court and the parties to review. If it appears, upon receipt of this report that the Court's plan is ineffective or unworkable, the Court will consider modifying this aspect of its Order.

[4] 4. *Access to Courts.* The most difficult aspect of this portion of the order was attempting to devise a plan which would provide the constitutionally required amount of access without exceeding the constitutional minimum. Obviously, the defendants may not be forced to provide more than minimally adequate access to the courts, and they must be allowed to choose their preferred method for providing that access, within minimal constitutional constraints. *See, Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). The defendants' proposed remedial plan was deficient in several respects. The most obvious deficiencies included increased responsibilities for prison law librarians without a corresponding increase in the amount of legal training offered to those individuals, and the proposed abolishment of the "jailhouse lawyer" system. Moreover, my Opinion of August 10, 1987 identified fundamental difficulties in the inventory system currently in place within the law library system, and defendants failed to propose a reasonable alternative to the current system. Finally, the defendants' plan for providing paralegal assistance to certain prisoners provided no assurance that prisoner communications with these paralegals would be con-

sidered confidential, and the requirement that prisoners execute a waiver of liability before such services would be provided to them would unacceptably undermine inmate confidence in the system. In addition, the defendants' plan creates an unacceptable degree of conflict of interest, in that the paralegals are employed and supervised by the very department they are paid to sue. The defendants' plan would also delay paralegal services provided to prisoners in segregation, with no provision for providing earlier assistance to those prisoners facing court-imposed deadlines.

[5] Plaintiffs' original plan also contained certain deficiencies. First, plaintiffs requested that the Court constrain the defendfants' ability to transfer prisoner paralegals to other institutions for nondisciplinary reasons. The Court declined to accept this recommendation for several reasons. First, I believe that it unacceptably intrudes on the discretion of prison administrators to control prison populations and to maintain discipline within the institutions. *See, Procunier v. Martinez,* 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974). Prisoner transfers may be necessary for any number of reasons, and the need to transfer a particular prisoner need not always relate to that prisoner's misconduct. Thus, I believe it is essential to maintain the defendants' discretion to transfer any prisoner for nonarbitrary or nonretaliatory reasons of sound corrections management. Second, while it is certainly possible that defendants will use this power to weaken the legal access program established by this order, by transferring trained prisoner paralegals to other institutions for retaliatory reasons, I do not assume that the defendants will act in that fashion. Until it becomes apparent that the defendants have abused their discretion, I am unwilling to usurp their role as administrators.

[6] Plaintiffs also suggested that the department's authority to search the legal access program's offices be curtailed. The defendants presented credible evidence that such a requirement would unacceptably intrude on their ability to maintain internal discipline and order. On the other hand, it is necessary to provide prisoners with some assurance that their confidential legal communications will in fact remain confidential. Thus, the order provides that the legal access program designate one staff member who is available at all times and within two hours of any departmental request to supervise a search or "shakedown" of the program's offices. This program staff member will be allowed to observe departmental searches of the program's offices, but the order does not incorporate plaintiffs' suggestion that only one departmental employee be allowed to search prisoner files at any one time. I believe that this compromise adequately takes into account prisoners' privacy interests in their legal papers, while allowing the department to conduct extensive searches of the program's offices on short notice.

[7] The order attempts to resolve the difficulties inherent in providing only the minimum amount of legal access constitutionally required by allowing the program's board of directors to adopt bylaws defining both the services which will be provided by the program and the types of prisoners to whom those services will be available. While this solution introduces a degree of uncertainty into the order, I believe that it represents a "healthy sense of realism" about the difficulties of administering any legal access program in a prison context. The board will know, better than the Court, which services are necessary and which inmates need those services, given the constitutional requirements and the inevitably limited resource the program will receive. It seems far more efficient to allow the individuals who provide those services to draw up regulations concerning their availability, than to have a Court, which

stands far removed from the realities of prison life, allocate those services. The order requires that the board adopt bylaws which will provide only the constitutionally required minimum amount of service. The department will have adequate representation on the board to insure that it performs this function adequately, and that it is aware of departmental budgetary constraints when it draws up the bylaws. Finally, the order requires that the board submit its bylaws to the Court for review. Should the board adopt over-zealous bylaws, the Court will be able to curtail that enthusiasm and ensure that defendants are required to do no more than that which is constitutionally required.

[8, 9] The order further requires the defendants to provide both paralegal assistance and law libraries to prisoners. Defendants' proposed order incorporated the same mix of services, and thus the Court does not believe that this aspect of the order requires defendants to provide more than minimally adequate services. *See, Penland v. Warrent County Jail,* 759 F.2d 524, 531-32 (6th Cir.1985); *Hooks v. Wainwright,* 775 F.2d 1433, 1437-38 (11th Cir.1985). Moreover, as I noted in my earlier opinion, the defendants failed to demonstrate at trial that the library system provided adequate access to illiterate prisoners, to prisoners who do not speak English or to prisoners who lacked the skills necessary to use the library materials available. Provision of paralegal assistance to at least those prisoners is constitutionally required. *Bounds,* 430 U.S. at 828, 97 S.Ct. at 1498.

The only other provision of the order which merits comment is the provision which allows defendants to abolish the mini law library system in exchange for providing greater paralegal assistance to prisoners in segregation units. Those units are currently provided legal access through the use of mini law libraries and through a call-out system which allows

prisoners to obtain books from the main law library. The order contemplates that defendants would abolish the mini law libraries, but leave the call-out system intact, while providing all segregation prisoners with paralegal assistance.

[10] I decided to provide defendants with this option because, after attempting to supervise the mini law library system in *United States v. Michigan*, No. G84-63, I have concluded that it is an unworkable solution to the problem of providing legal access to prisoners in segregation units. There have been chronic problems with maintaining the proper collection inside the mini law libraries and with preventing the mutilation of the remaining volumes. Even assuming the collections are maintained in a constitutionally adequate condition, I have no confidence that the majority of segregation prisoners possess the skills required to make adequate use of that collection. Further, there are very real security problems associated with maintaining the mini law libraries. The present system places a great burden on corrections officers in segregation units because it requires that prisoners be moved from their cells to the law library cell. The degree of prisoner movement involved increases security risks to guards and takes away from the time they have to perform their other duties.

[11] On the other hand, I cannot conclude that the mini law libraries do not provide constitutionally adequate access to the courts, assuming that the complete collection is maintained. The defendants have discretion to provide access to the courts through the use of law libraries. They are not required to provide legal assistance to prisoners if they provide adequate opportunities for "self-help" programs. *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498, *Penland*, 759 F.2d at 531; *Holt v. Pitts*, 702 F.2d 639, 640-41 (6th Cir.1983). It seems to me,

however, that a realistic evaluation of the mini law library system can lead only to the conclusion that it is more trouble than it is worth. While it does provide minimal access it also poses constant problems both in maintaining the adequate collection and in maintaining proper discipline and order within the segregaton units. As I have said, these shortcomings do not render the system constitutionally inadequate, they only indicate that it is inefficient. Thus, I believe it would be improper, and inconsistent with my previous rulings, to require defendants to abolish the mini law libraries. I have, therefore, decided to give them the option of abolishing that system, in exchange for their commitment to provide increased paralegal assistance to prisoners in segregation, including those prisoners who would otherwise be ineligible to receive those services. Obviously this would require modification of the consent decree currently in place in *United States v. Michigan*, and the Court would be disposed to grant a motion to that effect. In addition, defendants may have an obligation arising in *Hadix v. Johnson* to maintain the mini law library system. This Court, of course, has no control over that litigation and can give no assurance that the court or the plaintiffs involved in that case would agree to the system proposed in this order. I can only indicate that I think it would be a more efficient and more reasonable alternative for providing the constitutionally required access to the courts than the system currently in place.

CONCLUSION

This order represents at least a partial culmination of four years of litigation on numerous complex issues of constitutional law. The Court is confident that its order represents a fair and workable solution to the constitutional inadequacies noted in its previous opinion, and that it adequately balances

the constitutional rights of prisoners against the very real difficulties of prison administration encountered by the defendants. After such long and arduous litigation, an order which did not accomplish these goals would constitute a miscarriage of justice for the prisoners involved, for the defendants and for the public. For this reason, the Court retains continuing jurisdiction over this matter to monitor the implementation of its order, and remains open to the possibility that certain aspects of its order will require modification in light of the complex and intractable problems encountered by both prisoners and prison administrators.

ORDER

I. TOILETS AT RIVERSIDE CORRECTIONAL FACILITY

A. The defendants shall complete the installation of in-room toilet facilities in the administrative and reception units at the Riverside Correctional Facility (RCF) within twenty-six (26) months of the date of this Order.

B. Within sixty (60) days of the date of this Order, the defendants shall submit to the Court a plan for the construction of in-room toilet facilities at RCF. The plan shall identify the various stages necessary to complete the construction of these facilities (bidding, funding, planning, construction, etc.) and the expected completion date for each step.

C. Defendants shall submit quarterly reports to the Court and the parties indicating the progress of each stage of this project. Defendants shall submit such a report each quarter until the construction of the toilet facilities is completed.

D. The defendants shall promptly inform the Court and the parties of any anticipated delays in the completion of this project and the reason(s) for such delays.

E. Within thirty (30) days of the date of this Order, the defendants shall submit a plan for monitoring inmate access to sanitary toilet facilities at RCF during the interim between this Order and completion of this project. The defendants shall identify the monitor (who shall not be an employee of the Department of Corrections) and his or her duties. Those duties shall include regular inspections of interim facilities available at RCF, interviews with staff and inmates, the availability of clean urinals, cleaning supplies, and inmate release to use sanitary facilities. The monitor shall submit quarterly reports to the Court and the parties each quarter until construction of toilet facilities is complete.

II. LEGAL MAIL

A. Defendants shall revise their policy on the handling of legal mail to indicate that all mail received from any civilian attorney or paralegal, from a court or from the Legislative Corrections Ombudsman shall be opened only in the presence of the prisoner, if the prisoner submits a written request for such handling. The policy for handling legal mail shall be uniform at each institution involved in the instant litigation.

B. Once a prisoner has submitted a request in writing to have his legal mail opened in his presence, the request shall be indicated on the CMIS computer to alert all institutions to which the prisoner might transfer his or her legal mail requires special handling. Defendants shall revise their policy on the handling of legal mail to insure that all institutions are aware of and use this code.

C. Each prisoner who is received by the Department of Corrections at any of its Reception and Guidance Centers will be given written notice of this policy and asked if he wishes to have legal mail receive special handling. The defendants shall

ensure that prisoners who are unable to read this written notice shall receive equivalent notice of the legal mail policy. If the prisoner wishes to have his legal mail receive special handling, a notification to that effect shall promptly be placed on the CMIS computer. If the prisoner does not request special handling, the prisoner shall be informed that he may receive special handling at any time by submitting a written request to the mailroom supervisor at the institution where he is incarcerated.

D. Defendants shall submit, within thirty (30) days of the date of this Order, a plan to notify all current prisoners, on a one time basis, of the changes in the legal mail policy, and to place any requests of current prisoners to have their legal mail receive special handling on the CMIS computer.

E. Defendants shall submit, within thirty (30) days of the date of this Order, their proposed revision of the legal mail policy.

F. This Order shall become final upon the Court's approval of defendant's revised policy.

III. RACIAL SLURS

A. All prisoner grievances concerning racially derogatory conduct by staff shall be forwarded by the Director of Michigan Department of Corrections ("MDOC" or "the department") to the Legislative Ombudsman's Office for investigation. The Ombudsman's Office shall appoint a three person panel to investigate each grievance. The panel shall submit findings and recommendations to the Director of the department ("the Director") within thirty (30) days of receipt of the grievance.

1. In investigating the grievance, the panel may take any steps necessary to develop the relevant information concerning whether racially derogatory conduct by staff took place.

This should include the taking of statements from all persons in the area at the time the conduct allegedly occurred. lack of staff corroboration shall not automatically resolve the grievance in favor of staff. The panel shall not recommend disciplinary action unless it finds, by clear and convincing evidence, that the racially derogatory conduct took place.

2. The staff member alleged to have engaged in racially derogatory conduct and the inmate(s) submitting the grievance shall have an opportunity to appear before the panel to present a defense, to explain the charges made and to respond to any information developed by the panel. Inmates in segregation may be required to submit their comments in written form if security or logistical considerations prevent them from appearing before the panel in person.

3. Before making its final recommendation, the panel may require the staff member(s) and inmate(s) involved to meet in an effort to mediate the dispute. The parties may resolve the grievance in any manner which is agreeable to all parties and to the panel, including, but not limited to the following:

a. Less severe sanctions for staff conduct than those provided by this Order;

b. In any case where a prisoner has been subject to disciplinary action and alleges that the circumstances of the offense included some form of racial harassment, the panel and parties may agree to recommend to the Hearing Officer or the Administrative Segregation Committee that any punishment received by the prisoner be modified pursuant to paragraph IIIC of this Order. The Hearing Officer and the Administrative Segregation Committee shall accept this recommendation unless clear and convincing evidence indicates to the contrary.

c. The parties may agree to expunge the grievance from the Ombudsman's Office's records or from staff and prisoner records which would otherwise indicate that such a grievance had been filed or its result.

4. If the panel finds that racially derogatory conduct took place, the panel shall recommend the following disciplinary action, and shall inform the staff member, the grievant and the Director of its final recommendation and the reasons for this recommendation in writing:

a. In the case of any staff member who has less than two years seniority:

(i) first offense: formal counselling and a written reprimand to be placed in the staff member's personnel file;

(ii) second offense in two years: two days suspension without pay;

(iii) third offense in two years: three days suspension without pay;

(iv) fourth offense in two years: five days suspension without pay;

(v) fifth offense in two years: discharge;

b. In the case of any staff member who has two years or more seniority:

(i) first offense: two days suspension without pay ;

(ii) second offense in two years: three days suspension without pay;

(iii) third offense in two years: five days suspension without pay;

(iv) fourth offense in two years: discharge.

5. If the panel finds that the racially derogatory conduct did not take place, that the evidence does not support disciplinary action against the staff member, or that disciplinary action may not be taken against the staff member for other reasons, the panel shall advise the staff member, the grievant and the Director of that result and the reasons for the panel's decision in writing.

B. The Director, or his designated representative, shall review the panel's findings and recommendation and shall within ten (10) days of its receipt, inform the panel, the staff member and the grievant of the Director's decision to accept or reject the panel's recommendation.

1. If the Director takes no action within ten (10) days after receipt of the panel's finding and recommendation, the panel's finding and recommendation shall become final;

2. If the Director agrees with the panel's finding and recommendation, the panel's decision shall become final;

3. If the Director disagrees with the panel's decision, he shall inform all parties concerned of his reasons for rejecting the panel's decision and shall, within ten (10) days, meet with the panel to attempt to resolve the disagreement. If the director and the panel are unable to come to a mutually agreeable resolution of the grievance, the panel's decision shall become final. If the Director and the panel are able to agree upon a modified decision, they shall inform all parties of the modification in writing and that modified finding and recommendation shall become final.

C. Disciplinary Proceedings Against Inmates:

1. If an inmate charged with a disciplinary offense alleges that the circumstances of the offense included some form of

racially derogatory conduct by staff, this claim shall be referred to the panel established by the Ombudsman's Office. The panel shall investigate the claim in the manner described in paragraph IIIA(1) of this Order.

2. If the panel finds that racially derogatory conduct took place, the Hearing Officer in charge of the underlying disciplinary proceedings shall hold a rehearing to determine whether any remaining punishment should be modified. The report of the rehearing shall include the finding of racially derogatory conduct. In any case where disciplinary action against an inmate resulted in the assignment of the inmate to administrative segregation, and the placement was based in whole or in part on the incident involving racially derogatory conduct, the Administrative Segregation Committee shall review the decision to assign the inmate to administrative segregation and consider whether that assignment should be modified.

D. The Ombudsman's Office, or the panel, shall create and maintain a system of records to monitor the incidence of inmate grievances concerning racially derogatory conduct by staff members and the resolution of such grievances.

1. The records referred to above shall include, at a minimum:

a. Each such grievance filed, and each claim referred to the panel pursuant to paragraph IIIC of this Order;

b. The name(s) of the inmate(s) filing the grievance or claim and the staff member(s) against whom the grievance or claim was filed;

c. The result of such grievances or claims, including any disciplinary action taken or any other findings made by the panel;

d. Whether the Director agreed or disagreed with the panel's findings and recommendation and any modification of that decision made pursuant to paragraph III(b)(3) of this Order;

e. Whether the grievance was resolved through paragraph III(A)(3) of this Order and the agreement reached by the parties (including whether the Hearing Officer or Administrative Segregation Committee adopted the panel's recommendation to reduce or modify disciplinary action taken against a prisoner);

f. Whether disciplinary action taken against a prisoner was modified pursuant to paragraph III(A(3)(b) of this Order.

2. The panel may consider whether a staff member has had previous grievances filed against him or her which alleged racially derogatory conduct but which were not the subject of disciplinary action against the staff member, and/or whether the inmate filing the grievance has filed such grievances in the past which were not the subject of disciplinary action against a staff member only in the following circumstances:

a. In considering whether to modify its final findings and recommendations at the request of the Director pursuant to paragraph III(B) of this Order;

b. In considering a grievance for which there is no staff corroboration.

3. The Ombudsman's Office shall, on an annual basis, submit to the Court and the parties a report indicating the number of such grievances and claims filed, their outcome and any recommendations the Ombudsman's Office has for modifying the procedures created by this Order. The parties shall submit their written responses to this report, if any, within thirty

(30) days of its receipt. The Court will then entertain arguments for the modification of this portion of its Order.

IV. ACCESS TO COURTS

A. Legal Access Program

1. The MDOC shall contract with a non-profit corporation that will provide paralegal services in the subject institutions to assist prisoners in making collateral attacks upon their convictions and in challenging the conditions of their confinement.

a. The MDOC may choose to contract with an existing non-profit legal services corporation, such as Prison Legal Services at SPSM, provided that the authority and staff of such corporation are expanded consistent with the requirements of this Order.

b. The MDOC shall award the contract referred to in this paragraph within ninety (90) days of the date of this Order, unless it shows cause why, acting with all deliberate speed, the contract cannot be awarded within that time period.

2. Board of Directors:

a. Composition: The Board of Directors of this corporation shall consist of seven members, selected as follows (unless the MDOC decides to contract with an already existing program which has a board of directors or its equivalent):

(i) three members selected by defendants;

(ii) three members selected by the plaintiffs;

(iii) one member selected by a vote of the appointed members who shall serve as chair.

b. Term: The members of the Board of Directors shall serve two-year terms, without compensation.

c. The Board of Directors shall hire and supervise the Legal Program Director pursuant to paragraph IV(A)(3) of this Order.

d. Bylaws: The Board of Directors shall develop bylaws for the operation of the legal access program which bylaws shall be submitted to the Court for approval within ninety (90) days of the Board's appointment. The bylaws shall, at a minimum, address the following issues:

(i) Standards for determining which prisoners are entitled to receive the services of the program. These standards should, at a minimum, provide the following services;

(A) general research assistance to any prisoner using a law library;

(B) assistance in drafting pleadings, responding to motions or to reports and recommendations for inmates who are illiterate, who do not speak English or who are otherwise unable to translate their complaints into an organized presentation;

(C) the standards shall be designed to insure that the program provides only the minimum amount of service constitutionally required.

(ii) Duties of civilian paralegals hired pursuant to paragraph IV(A)(4)(a) of this Order, which shall include:

(A) periodic visits to segregation units, protective custody units and other areas of the institutions where inmates do not have direct access to a main law library;

(B) the frequency with which these visits must be made;

(C) prompt response to written prisoner requests for paralegal assistance;

(D) conducting inventories of main and mini law libraries and submitting orders for replacement or duplicate copies of library materials;

(E) regular "desk hours" in law libraries to provide general research assistance to prisoners using the libraries, including the times such assistance will be available, and the portion of the paralegal's work hours devoted to such assistance;

(F) regular "office hours" to discuss particular cases with clients unable to use the library; including how such visits will be scheduled and supervised and the portion of the paralegal's work hours devoted to such assistance;

(G) scheduling of law library time for general population prisoners (call-outs), including scheduling time for meetings between "jailhouse lawyers" and other prisoners and between prisoner paralegals and other prisoners;

(H) delivery of materials from the main law library to prisoners who would not otherwise have access to the main law library.

(iii) Duties of prisoner paralegals, hired pursuant to paragraph IV(A)(4)(b) of this Order, to include:

(A) regular "desk hours" at law libraries to provide general research assistance to prisoners;

(B) provision of research and drafting assistance to civilian paralegals;

(C) rules governing confidential conferences between prisoner paralegals and other prisoners, if any such conferences are to be allowed, and how those conferences should be scheduled and supervised.

(iv) Standards for denying program assistance, other than general research assistance to prisoners, and alternatives to

be made available to prisoner if program assistance is denied. These standards should address the issues of:

(A) assaultive prisoners;

(B) prisoners who wish to proceed with frivolous complaints and/or prisoners who are excessively litigious;

(C) categories of cases the program shall not provide assistance for (e.g., cases for which equivalent services are already available).

e. Shakedowns and other security issues: The Board shall provide a means by which at least one civilian staff person is "on call" at all times (available 24 hours a day and within two hours of any department request) for the purpose of facilitating shakedowns pursuant to paragraph IV(a)(5)(d) of this Order. The Board shall insure that the appropriate departmental staff at each subject institution are aware at all times of the identity and location of the staff person designated pursuant to this paragraph.

f. Annual Report: The Board shall prepare an annual report to be submitted to the Court and the parties. This report shall include annual case statistics, prisoner utilization data, a review of library inventories and replacement of materials or provisions of duplicate materials, a review of staffing levels required pursuant to paragraph IV(A)(4)(a) and (b) of this order and any recommendations the Board may have for the modification of any provision of this Order.

3. Program Director: The Board shall hire one program director who shall be an attorney licensed to practice in the State of Michigan. The Board shall conduct an annual performance evaluation of the Director.

a. The Director's salary and benefits shall be competitive

with the salary and benefits provided to other attorneys employed by the State of Michigan.

b. The Director shall have the following duties:

(i) Hiring, training and supervision of civilian and prisoner paralegals at each institution;

(ii) Development of the training curricula for civilian and prisoner paralegals which shall include both substantive and procedural matters;

(iii) Processing of prisoner grievances regarding the law library, library collection and paralegals. All such grievances shall be made directly to the program director as a Step III grievance;

(iv) Approval of "jailhouse lawyer" contracts pursuant to the standards currently specified in PD-DWA-61.01 and Rule 791.6617.

(v) The presentation of an annual report to the Board which shall include:

(A) performance evaluations of civilian and prisoner paralegals;

(B) annual case statistics, prisoner utilization data and recommendations for changes in staffing requirements.

4. Staffing Requirements: In addition to the Program Director, the following staff shall be provided at each institution;

a. Civilian Paralegals: Each institution shall have full-time civilian paralegals, who shall possess at least a two-year paralegal degree, as follows:

MPB: One for general population and trustee
One for segregation and protective custody
MR: One for general population and trustee

One for segregation and protective custody
SPSM North: One
SPSM South: One

b. Prisoner Paralegals:

(i) Each institution shall hire paid prisoner paralegals as follows:

MBP:	4
MB-Trustee:	2
MR:	5
MR-Trustee:	1
SPSM North:	3
SPSM South:	3

(ii) This position shall be a paid prison job assignment with wages comparable to those in Industries.

(iii) The department shall retain the right to transfer prisoner paralegals for disciplinary and other reasons consistent with sound corrections management. The department shall, however, insure that prisoner paralegals are not transferred for arbitrary or retaliatory reasons.

(iv) Prisoner paralegals shall be hired by the program director upon recommendation of the civilian paralegal and shall not be restricted by the prison job classification requirements. In the hiring process, the program director and civilian paralegal shall consider the candidate's skill, interests and length of sentence. When prisoners have equal skills and interest, the civilian paralegal shall recommend the prisoner with the longest sentence.

c. Inmate Law Clerks: Defendants shall either retain the inmate law clerks with their current duties and training or provide a corresponding increase in the number of prisoner

paralegals hired and transfer duties currently given to law clerks to the prisoner paralegals.

5. Physical Requirements

a. Sufficient office space will be provided for all civilian paralegals at or near the main law libraries with suitable privacy to conduct interviews with prisoner clients.

b. Hours of operation shall not be limited by the hours of operation of the law library.

c. Existing equipment and supplies shall be available to the program and shall include the following at each main law library office:

(i) photocopy machine;

(ii) electric typewriters;

(iii) telephone lines with access to both instituitonal and outside lines (provided, however, that prisoner paralegals shall not be allowed access to outside telephone lines).

d. All shakedowns of the areas in which the employees of the corporation work shall be done in the presence of the civilian employee of the program designated pursuant to paragraph IV(A)(2)(d)(v) of this Order. Shakedowns shall be conducted in such a manner that Department employees do not read the legal materials and that the civilian paralegal or other emplyee is able to observe each Department employee as the search is carried out. Department employees shall conduct the search in such a manner as to assure only searches for contraband and not the reading of client files.

B. Libraries

1. The defendants shall supplement the required minimum collection at each main law library with at least one copy of the following materials:

a. A complete set of Wright and Miller, *Federal Practice and Procedure;*

b. Michigan Civil Jury Instructions

c. Local state court rules and the local rules for the Western and Eastern Districts of Michigan and for the Sixth Circuit;

2. The defendants shall supplement the required minimum collection at the main law library at Marquette Branch Prison with the materials noted in paragraph IV(B)(1) of this Order, and with a recent treatise on Habeas Corpus and Post-Conviction Remedies.

3. Defendants shall maintain the mini law libraries at each of the subject institutions and shall supplement the collection at each mini law library with the following materials:

a. Current PDs and OPs;

b. State Administrative Rules regarding the MDOC;

c. Pencils, writing and carbon paper, kite and grievance forms, and forms to request books from the main law library collection:

d. Posted instructions on obtaining assistance from the civilian paralegal and obtaining books from the main library collection;

e. At least two chairs and suitable surface space for interviews with the civilian paralegals.

4. As an alternative to the maintenance of the mini law libraries pursuant to paragraphs IV(A)(6) and IV(B) of this Order, the defendants may choose to abolish the mini law libraries and to provide, instead, increased paralegal assistance to prisoners in segregation units. If the defendants adopt the latter alternative, defendants shall provide appropriate increases in the civilian and prisoner paralegal staff pursuant to

paragraph IV(A)(4) of this Order and shall authorize the legal access program to provide all necessary legal services to all prisoners in segregation units. This will include all general research assistance as well as assistance in drafting pleadings and other legal documents. Defendants shall insure that paralegal assistance is provided to segregation prisoners who might not otherwise require such assistance, in order to replace the previously available self-help assistance provided by the mini law libaries. Nothing in this paragraph shall be construed to alter segregation prisoners' current level of access to materials from the main law libraries on a call-out basis. Defendants shall inform the Court and the plaintiffs of their decision, as between these alternatives, within ninety (90) days of the date of this Order.

5. Defendants shall assure that prisoners at the Michigan reformatory Trustee Division have access to the courts through either of the following means:

a. Establishment of a main law library with the required minimum collection and the supplements ordered in paragraph IV(B)(1) and IV(B)(2) of this Order plus general research assistance and advice for prisoners who require it from a civilian or prisoner paralegal; or

b. Establishment of a mini law library pursuant to paragraph IV)B)(3) of this Order with access to the services of a civilian paralegal and to books from a main law library without the necessity of requesting a temporary transfer to another institution.

c. Defendants shall inform the Court and the plaintiffs of their decision, as between these alternatives, within ninety (90) days of the date of this Order.

6. Library Time:

a. Time in the mini law library shall not be restricted.

b. Time in main law libraries will be as follows:

(i) General population: Six (6) hours weekly, with additional time as needed and approved by the civilian paralegal;

(ii) Jailhouse Lawyers: No restriction for those prisoners providing legal assistance to other prisoners pursuant to defendant's policy directive PD-DWA-61.01 and Rule 791.6617.

c. Time spent in conference with the prisoner or civilian paralegals shall not be counted as law library time.

7. Inventories;

a. Defendants shall insure that each subject institution uses a standardized form to inventory main and mini law library collections. The current SPSM form is acceptable.

b. The civilian paralegal shall conduct inventories of the main and mini law libraries at least semi-annually. Prisoner paralegals shall conduct inventories of the main law library collections for quarters during which the civilian paralegal does not conduct an inventory.

c. The semiannual inventories conduced by civilian paralegals shall be submitted to the Program Director for review and to the librarian at each institution.

d. The civilian paralegal shall post the most recent inventories of the main and mini law library collections in each mini law library.

e. The Program Director shall submit to defendants a plan for standardizing the replacement of law library materials and for providing duplicate copies of those materials when needed. The plan shall create a standard for determining when a duplicate copy must be ordered and shall identify the

individual(s) responsible for ordering duplicate and replacement materials.

V. CONTINUING JURISDICTION

The Court shall exercise continuing jurisdiction over this matter to monitor defendants' compliance with this Order.

VI. FINAL ORDER

Notwithstanding any obligation to submit plans to this Court, the defendants are directed to act with all deliberate speed to immediately implement the various requirements of this Order. This Order is intended to become final and appealable within ninety (90) days of the date of this Order, or upon a submission by defendants indicating their choice between the alternaties noted in paragraphs IV(b)(4) adn IV(B)(5) of this Order, whichever occurs first.

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

(2)

No. 92-1202

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

GARY KNOP, et al,

Petitioners,

v.

KENNETH L. McGINNIS, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

DID THE COURT OF APPEALS APPLY AN INCORRECT STANDARD IN DETERMINING WHETHER THERE WAS EVIDENCE OF A SUFFICIENT DEGREE OF FAULT BY SUPERVISORY STATE PRISON OFFICIALS TO IMPOSE LIABILITY ON THEM FOR AN ALLEGED CONSTITUTIONAL VIOLATION CAUSED BY LOWER LEVEL NON-PARTY EMPLOYEES USING RACIAL SLURS AGAINST PRISON INMATES?

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COUNTERSTATEMENT OF THE CASE

This class action lawsuit was filed in 1984 by several prison inmates alleging unconstitutional prison conditions at the State Prison of Southern Michigan, Michigan Reformatory, Marquette Branch Prison, and Riverside Correctional Facility. The Petitioner class consists of those inmates confined in these institutions. Respondents are management officials and do not include the State of Michigan or the Michigan Department of Corrections.

In their amended complaint, Petitioners alleged that their constitutional rights were violated due to inadequate physical and mental health services, unsanitary conditions, lack of access to the courts, and lack of protection from harm. Within the claim of lack of pro-

tection from harm, Petitioners alleged that desirable jobs were disproportionately assigned to white inmates, that cafeteria serving lines were segregated by race, that black inmates were assigned to punitive segregation in disproportionate numbers; that white inmates were assigned to protective custody in disproportionate numbers; and that white staff displayed attitudes of racially motivated hostility toward black inmates. Petitioners complained that racial tension contributed to the atmosphere of violence, hence, is included in the claim of protection from harm.

Following a trial on the merits and dismissal of many of the claims, the District Court issued an opinion and order on the issues of legal mail; lack

of adequate winter clothing; lack of in-cell toilets and wash basins at the Riverside facility; access to courts; and, racial discrimination. App. to Pet. at 42a-135a. Following the submission of proposed remedial plans, the Court issued a final opinion and order. App. to Pet. at 136a-168a.

With respect to the racial claims presented, Petitioners prevailed on none, except the claim of racial harassment in the form of racial slurs. The District Court found that Respondents did not intentionally discriminate against black inmates in the administrative segregation or the punitive segregation process. App. to Pet. at 118a-119a. There was little or no evidence that the hearing officers or the security classification

committees intentionally discriminated against black inmates. Id. Petitioners did not establish that racially motivated misconduct ticketing practices existed. Id.

The District Court also found that Petitioners did not satisfy their burden of proof relative to the claims of segregation in the dining lines and the eating areas. App. to Pet. at 125a-128a. Petitioners were able to voluntarily choose a dining line and eating area. Id. at 127a.

Petitioners also did not prevail on their claim that Respondents intentionally discriminated against black inmates by assigning the white inmates to the higher level, more prestigious jobs. App. to Pet. at 128a. In fact, the Court

found that Petitioners' statistics showed no overwhelming racial disparities and that on many occasions, the disparity, if any, was insignificant. Id. at 129a.

The only allegation relative to a racial issue upon which Petitioners prevailed is that related to the use of racial slurs. The District Court found that although most correctional staff did not use racial slurs, the number that did was large enough to expose the inmates to a "constitutionally intolerable atmosphere of racial harassment." App. to Pet. at 122a. Although the named Respondents, as individuals, did not condone the use of racial slurs, the Court held that the Department of Corrections (not a Respondent) was liable for the racial slurs of certain non-party correctional

officers. Id. at 124a, 123a, respectively.

The Court ordered that "JUDGMENT is entered FOR defendants and AGAINST plaintiffs on plaintiffs' claim that black inmates at the subject facilities are, as a class, subjected to intentional racial discrimination in violation of the equal protection clause of the Fourteenth Amendment; JUDGMENT, however, is entered FOR plaintiffs and AGAINST defendants on plaintiffs' claim that they are subject to racial harassment in the form of racial slurs." App. to Pet. at 135a. The Court opined that "every governmental entity is obligated, albeit not always constitutionally required, to expend every effort to eradicate it [racial discrimination] completely from public

life." App. to Pet. at 135a. Disappointed that the Department of Corrections was not "completely meeting that obligation", Id., the Court imposed an elaborate grievance process coordinated by the Legislative Ombudsman's Office. App. to Pet. at 152a-158a. This process included a detailed, progressive discipline system for the guilty correctional officers and maintenance of a record system to monitor the incidences of racial slurs. Id.

Respondents appealed the orders of the District Court on several issues, including the issue of racial slurs. The Court of Appeals held that although racial harassment can form a basis for liability on the part of individuals, supervisory officials are not liable for such conduct by their subordinates with-

out evidence that the officials encouraged or directly participated in the conduct. App. to Pet. at 32a. The appellate panel found that the failure to investigate the racial harassment claims did not rise to the level of conduct required for the placement of liability on Respondent officials. Id.

SUMMARY OF ARGUMENT

This Court's rules caution that "review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. This petition clearly fails to meet this threshold requirement. Petitioners attempt to bring their arguments before this Court on the premise

that the Court of Appeals opinion is "sharply at odds with other Circuits". In fact, the Sixth Circuit applied the applicable standard of liability to the facts at hand.

Petitioners argue that the Sixth Circuit should have adopted the "deliberate indifference" standard as articulated in City of Canton v. Harris, 489 U.S. 103 (1989), a case decided one month prior to the submission of Petitioners' final appellate brief. The holding in City of Canton clearly sets forth a standard to be applied when a local government's failure to properly train its employees causes a constitutional violation. City of Canton is distinguishable from this case in that there is no local government defendant, and there is no

allegation of failure to train employees. The issue is to what extent supervisory officials of a state government can be held liable for the actions of their subordinates. The Court of Appeals reviewed the findings of the District Court and concluded, on the specific facts of this case, that the Respondent state supervisory officials are not liable for the actions of their subordinates since they did not encourage or participate in the misconduct.

The Sixth Circuit made no ruling at odds with other circuits since, on the facts of this case, the "encourage and participate" standard it applied is not substantively different than the "deliberate indifference" standard discussed in City of Canton.

Moreover, 42 U.S.C. § 1983 does not provide a remedy for every wrong, including negligence, defamation, or other state law tort. It is intended to provide relief for constitutional violations. On the facts of the instant case the verbal harassment, including the use of racial slurs by a few non-party prison employees, however repugnant, does not form the basis of a constitutional violation by the Respondent supervisory state officials under this statute.

The District Court specifically did not find a constitutional violation on any race discrimination claim. The Court did, however, attempt to weave a claim of racial slurs used by a minority of correctional officers, who were not named as defendants, into a pattern of behavior,

then attributed this conduct to a "policy practice or custom" of the Michigan Department of Corrections which is also not a defendant. Following this analysis, the District Court imputed a constitutional violation to Respondent supervisory officials. This approach is incorrect as a matter of law and is unsupported by the record and the Court of Appeals was correct in rejecting it.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT APPLY AN INCORRECT STANDARD IN DETERMINING WHAT DEGREE OF FAULT MUST BE EVIDENCED IN ORDER TO IMPOSE LIABILITY ON SUPERVISORY STATE PRISON OFFICIALS FOR A CONSTITUTIONAL VIOLATION CAUSED BY LOWER LEVEL NON-PARTY EMPLOYEES USING RACIAL SLURS AGAINST PRISON INMATES.

The petition is based upon the assertion that the Court of Appeals used an improper standard in evaluating the degree of fault which must be shown to impose liability on these individual supervisory Respondents for the conduct of other non-party employees. Petitioners' contentions are based upon the fact that the Court of Appeals opinion does not recite the phrase "deliberate indifference" and does not cite the case upon which Petitioners now heavily rely.

Respondents submit that when the Court of Appeals opinion is properly viewed in the context of the facts of this case, it becomes apparent that the standard used by the Court of Appeals is not substantively different than the standard Petitioners espouse and that because the outcome of this case depends solely upon its own unique facts, this decision is not in conflict with decisions of this Court or other courts of appeal.

The District Court found that the Respondents do not condone the use of racial slurs, that the "vast majority" of prison employees do not engage in such conduct, App. to Pet. at 124a, but that the use of such language by a minority of prison employees (who were never named as defendants) constitutes racial harassment

which is a "policy, practice or custom of the Department of Corrections" (which also was never named as a defendant). App. to Pet. at 123a. The Court found that the individual supervisory Respondents "have failed to implement policies that would prevent this situation from occurring, and affirmatively encourage its continuation." App. to Pet. at 124a. The District Court did not cite any evidence of specific affirmative conduct by Respondents to support this conclusion and Respondents deny that there is any such evidence in the record. The Court of Appeals examined the record and concluded, App. to Pet. at 32a: "The defendants' failure adequately to investigate claims of racial harassment in this case did not, in our view, rise to the level of 'encouragement.'"

Respondents do not agree that the use of racial slurs by a minority of prison employees who are not named as parties constitutes a basis for imposing liability on the individual supervisory Respondents under 42 U.S.C. § 1983. This Court has recognized the difference between the question whether a plaintiff's harm was caused by a constitutional violation and the question whether another entity has a sufficient degree of fault to be deemed responsible for that violation. City of Canton, supra, 489 U.S. at 388, n. 8; Collins v. City of Harker Heights, Texas, 503 U.S. ___, 117 L. Ed. 2d 261 (1992). Nevertheless, assuming arguendo that the use of racial slurs can constitute a constitutional violation, it is apparent that the District Court and Court of Appeals both applied the same substantive

standard to evaluate whether the individual Respondents evidence a sufficient degree of fault to subject them to liability. The outcome of this case simply depends on the fact that the District Court and Court of Appeals disagree whether Respondents' actions encouraged a constitutional violation.

Petitioners attempt to superimpose case law applicable to the imposition of liability on municipalities for improper training of employees onto the realm of the standards applicable to imposing liability on individual state officials. In Monell v. Dept. Soc. Serv. of City of New York, 436 U.S. 658, 694 (1978), this Court held that, unlike state governments which are protected by Eleventh Amendment immunity, local governments may them-

selves be liable under 42 U.S.C. § 1983 when the execution of a governmental policy or custom causes a constitutional violation. In the instant case, there is neither a local government defendant nor a documented injury. There is not even a state government defendant. The Respondents here are individual state government officials, primarily the Director of the Michigan Department of Corrections and several prison wardens.

Petitioners improperly rely on principles of municipal liability which were reiterated by this Court in City of Canton v. Harris, supra. The issue in City of Canton was whether a municipality can ever be held liable under 42 U.S.C. § 1983 for constitutional violations resulting from its failure to train

municipal employees. Id. at 380. This Court held that "[r]espondent superior or vicarious liability will not attach under § 1983", but that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 385, 388. The Court cited from earlier decisions and elaborated upon the meaning of the phrase "deliberate indifference," Id. at 388-389:

> ...a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation". *** "[M]unicipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. *** Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality--a policy as defined by our prior cases--can a city be liable for such a failure under § 1983.

Monell and its progeny, including City of Canton, have no direct application in the context of state governmental entities or officers since those cases deal only with imposition of liability on a local governmental entity for the entity's own actions. The Monell principles simply do not control in the instant case, which deals only with allegations of liability of individual state governmental supervisory officials for the conduct of lower level state employees who were never named as defendants. The issue of failure to train state corrections officers or any state employees was never alleged or litigated in the instant case.

Respondents in this case include the Director of the Michigan Department of

Corrections, the Deputy Director of Correctional Facilities Administration, Regional Prison Administrator, and four prison wardens. Liability of these officials cannot be established absent a clear showing that they had a sufficient degree of fault to be deemed responsible for a constitutional violation arising from the activity that forms the basis of the complaint.

A pervasive pattern of unconstitutional conduct flowing from a deliberate plan by the named defendants must be shown. Rizzo v. Goode, 423 U.S. 362, 375 (1976). A failure to act is insufficient to prove liability. Id. at 375-76. The supervisor must be shown to have "encouraged the specific incident of misconduct or in some other way directly

participated in it." Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir.), cert. den., 469 U.S. 845 (1984). Without more, failure to supervise, control, or train government employees is insufficient. Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982). It is the above principles that were relied upon by the Court of Appeals in deciding the merits of Petitioners' claim. App. to Pet. at 31a-32a. Under the facts of the instant case, the standard applied by the Court of Appeals is not substantively different than the standard Petitioners espouse in the petition.

Citing Hays, the trial court found in a conclusory fashion that the Department of Corrections, not the Respondents, "explicitly or implicitly authorizes,

approves, or knowingly acquiesces in the unconstitutional harassment of black inmates by certain staff officers." App. to Pet. at 123a. None of the named Respondents were specifically cited for any conduct indicating encouragement or participation in the offensive conduct of correctional officers. Under the guise of a purported failure to act, the District Court improperly imputed the acts of non-party correctional officers to Respondents and improperly imposed vicarious liability. App. to Pet. at 122a-125a.

The Court of Appeals properly rejected this approach and held that Respondents' failure to adequately investigate reports of racial slurs did not rise to the level of encouragement

required to impute liability to these supervisory personnel. Id. at 32a.

The use of racially derogatory language may support hostile work environment claims under Title VII. Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985). See Powell v. Missouri State Highway and Transportation Department, 822 F.2d 798 (8th Cir. 1987). A claim based upon Title VII, however, will not support an action pursuant to 42 U.S.C. § 1983 unless there is also an infringement of rights guaranteed by the Constitution. Day v. Wayne County Board of Auditors, 749 F.2d 1199, 1204-1205 (6th Cir. 1984); see also, Poe v. Haydon, 853 F.2d 418, 428 (6th Cir. 1988). Thus, although the use of racial slurs may give rise to relief in other

causes of action, a constitutional violation is necessary to prevail under 42 U.S.C. § 1983. Paul v. Davis, 424 U.S. 693 (1976).

In the instant case, the District Court specifically found that the named Respondents individually did not condone the use of racial slurs. App. to Pet. at 124a. Instead, the court concluded that the Department of Corrections, not a named defendant, was liable for the unconstitutional harassment of black inmates by "certain staff officers." Id. at 123a. An attempt was then made to impute this liability to Respondents in their official capacities. Id. at 124a. Ironically, in the judgment and order, the Court specifically ruled against Petitioners on the claim that black

inmates were subjected to intentional racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. App. to Pet. at 135a. The court ruled for Petitioners on the claim "that they are subject to racial harassment in the form of racial slurs", Id., without a finding of a constitutional violation.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

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February 18, 1993

Supreme Court, U.S.
FILED
MAR 3 1993
OFFICE OF THE CLERK

No. 92-1202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GARY KNOP, *et al.*,

Petitioners,

v.

KENNETH L. McGINNIS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

The respondents suggest several arguments in an attempt to distinguish City of Canton v. Harris, 109 S.Ct. 1197 (1989), from this case. First, the respondents argue that the standard used by the court of appeals in reversing the district court is not "substantively different" from the City of Canton standard. Respondents' Brief at 14. However, as demonstrated in the petition for certiorari, the trial court made all the findings required under City of Canton to hold a governmental entity responsible for a constitutional violation actually executed by individual employees. The court of appeals did not reverse any of these findings as clearly erroneous, or even indicate a disagreement with these findings.[1] Instead, the court of appeals

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[1] Respondents suggest that "the outcome of this case depends solely upon its own unique facts." Respondents' Brief at 14. However, the court of appeals did not (continued...)

reversed because it applied a different standard to the trial court's findings; the court of appeals found that the respondents did not "encourage" the racial harassment. App. at 32.

Under the deliberate indifference standard of City of Canton, the focus is on the degree of fault that "must be evidenced by the [government's] inaction before liability will be permitted." Id. at 1204. (Emphasis supplied).

In contrast, the "encouragement" standard applied by the court of appeals in this case seems to assume that inaction can never make a governmental unit responsible for constitutional violations by its employees. By requiring that the

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[1](...continued)
reverse any of the trial court's findings as clearly erroneous. Necessarily, then, the critical factor was the court of appeals' application of its own standard rather than the City of Canton standard.

If this case turned on its facts, the trial court should have been affirmed.

policymakers actively promote or "encourage" the constitutional violation, the court of appeals failed to heed the teaching of City of Canton.

Respondents also suggest that City of Canton does not apply because that case involved municipal defendants, while in this case state officials are defendants. See Respondents' Brief at 17-21.[2] Because the petitioners in this case seek injunctive relief, however, the state officials sued in their official capacities have the same defenses as those available to municipal defendants. See, e.g., Kentucky v. Graham, 473 U.S. 159, 166-167, 169 n.18 (1985).

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[2] Respondents appear to suggest that the Department of Corrections should have been named as a defendant. See Respondents' Brief at 15. Of course, the Department of Corrections was not a proper defendant; the proper defendants for claims requesting injunctive relief were the state officials sued in their official capacities. See Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

Similarly, the respondents argue that the persons who carried out the deprivation of constitutional rights in this case are individual officers who are not sued as defendants.[3] In City of Canton, however, this Court indicated that a municipality as an entity would be liable for a policy or custom of failing to train its police officers if that policy resulted in injury. Accordingly, the issue in City of Canton was precisely the circumstances in which governmental policymakers, and thus the governmental unit as an entity, are responsible for a constitutional violation executed by individual employees.

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[3] The respondents suggest that the racial slurs were caused by "a few non-party prison authorities." Respondents' Brief at 11. Respondents' characterization of the record is unsupported by the actual findings of the trial court. The trial court "specifically [did] not find that most correctional staff engage in this kind of behavior. A sufficiently large number do, however, to expose black inmates to a constitutionally intolerable atmosphere of racial harassment." App. at 124.

The respondents also seek to distinguish City of Canton by arguing that that case describes the standard for "failure to train" cases. See Respondents' Brief at 9-10. While true, this observation does not assist respondents. In essence, the petitioners' claim here is that the responsible defendants failed to supervise the staff who engaged in racial slurs. In City of Canton, the Court repeatedly cites cases involving claims of a failure to supervise employees as examples of cases involving "failure to train" claims. See, e.g., 109 S.Ct. at 1204 n.6; see also id. at 1209 (O'Connor, J., concurring).

Respondents also appear to suggest that an official policy or custom of racial harassment cannot violate the Constitution. See Respondents' Brief at 24-25. None of the cases cited by respondents supports such an argument. In fact, Poe v. Haydon, 853 F.2d 418, 429 (6th Cir. 1988), cited by

respondents at p.24 of their brief, holds that "[t]he case law before December 1984 established that sexual harassment by government employees would violate the rights protected by the equal protection clause." Harassment on the basis of race surely has no greater constitutional protection than harassment on the basis of sex.

Finally, respondents argue that Rizzo v. Goode, 423 U.S. 362 (1976), requires a "deliberate plan" of misconduct by the named defendants. Respondents' Brief at 21. In fact, Rizzo does not speak of a "deliberate plan." Rather, Rizzo notes that, in that case, "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners." Rizzo at 371. But City of Canton is completely consistent with Rizzo. Under City of Canton, the "affirmative link" demanded by

Rizzo is supplied when the governmental unit is deliberately indifferent to unconstitutional acts by its employees, resulting in a "policy or custom" of misconduct. In this case, the trial court found both conscious indifference[4] and the existence of a "policy or custom." Under these circumstances, petitioners met the standard for relief set forth in City of Canton and the court of appeals erred in reversing.

CONCLUSION

For all the reasons set forth herein, petitioners urge that the Court grant certiorari.

---

[4] See discussion in petitioners' opening brief at 18-19, n.6.

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